Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ROBERTSON, STEPHENS & COMPANY,
Petitioner,

v.

TONYJA DUFFIELD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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135 pp

QUESTION PRESENTED

Whether by enacting the Civil Rights Act of 1991, which states that "[w]here appropriate and to the extent authorized by law, . . . arbitration is encouraged to resolve disputes arising under [the federal statutes amended by this title]," Congress intended, contrary to this Court's ruling in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), to preclude arbitration of Title VII and state statutory antidiscrimination claims pursuant to individual arbitration agreements entered into as a condition of employment.

PARTIES

All parties appear in the caption of the case on the cover page.

While the action below was pending, petitioner Robertson, Stephens & Co., through a merger, became BancAmerica Robertson Stephens. Pursuant to Rule 29.6 of the Rules of this Court, petitioner BancAmerica Robertson Stephens states it is a wholly owned subsidiary of BankAmerica Corporation. BankAmerica Corporation has recently entered into an agreement to sell certain assets of BancAmerica Robertson Stephens, specifically the Robertson Stephens Division, to BankBoston Corporation in a stock sale. Upon completion of the sale on or about August 31, 1998, petitioner shall become a wholly owned subsidiary of BankBoston Corporation and shall be known as BancBoston Robertson Stephens. For convenience's sake, however, the caption and text of this petition refer to petitioner as Robertson, Stephens & Co.

BankBoston Corporation has neither a parent corporation nor any subsidiary which is nonwholly owned or publicly traded.

BankAmerica Corporation does not have a parent corporation. BankAmerica Corporation has the following corporate subsidiaries or affiliates which are not wholly owned, including those that are or may be publicly held: BA Merchant Services, Inc.; BankAmerica Capital I; BankAmerica Capital II; BankAmerica Capital III; BankAmerica Capital IV; BankAmerica Institutional Capital A; BankAmerica Institutional Capital B; KorAm Bank; BA Lepanto (Philippines); Hong Kong and

Shanghai Insurance Co. Ltd.; AArnBank Singapore; Inchroy Credit Corporation Ltd.; Foppingadreef Investments; Debt Recovery Ltd.; 693327 Ontario Limited; Advanced Quick Circuits, Inc.; Advanced Quick Circuits, L.P.; AMB Investment Real Estate, L.P.; Annapolis Apartments Limited Partnership; Arrowhead LLC; Asia Port Investors LLC; BA Rescarven Holding Company; BA Savings Bank; Bay 2 Bay Leasing LLC; Bel/Boy Limited Partnership; BJ Services Trust 1997-1; Broadway Pointe Venture, LLC; California Equity Fund 1991 Limited Partnership; California Equity Fund 1993 Limited Partnership; Colony Petroleum, L.L.C.; Concorde Solutions, Inc.; Crossover Investment Management, L.L.C.; Custom Acquisition Corporation; Custom Industries, L.P.; DFO Partnership; Discovery View Associates Limited Partnership; Duo-Tang, Inc.; Golden West/Henry Building Limited Partnership; Home Technology Healthcare, Inc.; LATCH Easternwood Limited Partnership; LNS Group, Inc.; Maguire Partners-Glendale Center, L.L.C.; MCG Northwest, Inc.; New Homes for North Kenwood-Oakland Limited Partnership; PBS Building Systems, Inc.; Phaestos FSC, Inc.; Plastic Engineered Components, Inc.; Port Orchard First Limited Partnership; Railcar Associates, L.P.; RS & Co. Environmental Partners, L.P.; RS & Co. Venture Partners IV, L.P.; RSRF Ranch Company, LLC; SABA Medical, Inc.; SABA Medical, L.P.; Sardonyx Shipping Pte Ltd.; Stamford Associates; Tiryns FSC, Inc.; Titusville Station Associates Limited Partnership; and Vine Court Limited Partnership.

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Petitioner respectfully submits that a writ of *certiorari* should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 144 F.3d 1182, 76 Fair Empl. Prac. Cas. (BNA) 1450, Fed. Sec. L. Rep. ¶ 90,202, and is reprinted in Appendix A hereto at 1a-56a. The district court's opinion of August 26, 1996, denying respondent's motion for partial summary judgment, is not reported and is reprinted in Appendix B at 57a-71a. The district court's opinion of March 13, 1997, granting petitioner's motion to compel arbitration and certifying the orders for interlocutory appeal, is not reported and is reprinted in Appendix C at 72a-87a. The court of appeals' order of April 21, 1997, granting permission to appeal pursuant to 28 U.S.C. § 1292(b), is reprinted in Appendix D at 88a.

JURISDICTION

The court of appeals' opinion was filed on May 8, 1998. This petition is being timely filed within 90 days of that opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Respondent first invoked federal court jurisdiction in the case under 28 U.S.C. §§ 1331, 1343, and 1367.

STATUTES INVOLVED

The following statutes are involved in this case: the Civil Rights Act of 1991, Pub. L. 102-166, and the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* The pertinent text of these statutes is set forth in Appendix E at 89a-90a.

STATEMENT OF THE CASE

By holding that arbitration agreements entered into as a condition of employment are not enforceable with respect to Title VII and state antidiscrimination statutory claims, the Ninth Circuit invalidated significant portions of arbitration agreements that are the norm in the securities industry and commonplace in many others. The Ninth Circuit's decision effectively rejects this Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and is in conflict with the decision of every other circuit court that has addressed the issue, including the recent Third Circuit decision in *Seus v. John Nuveen & Co.*, __ F.3d __, No. 97-1498, 1998 WL 294020 (3d Cir. June 8, 1998). The decision below raises one of the most important and often litigated issues in the field of employment law today: whether employers and individual employees may agree as a condition of employment to arbitrate state and federal discrimination claims. Further guidance from the Court on the application of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), to statutory discrimination claims, seven years after the decision in *Gilmer*, is essential.[1]

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[1] A writ of *certiorari* in this case, in conjunction with the Court's recent grant of *certiorari* in *Wright v. Universal Maritime Service Corp.*, 118 S. Ct. 1162 (1998), involving the arbitration of individual statutory discrimination claims pursuant to a collective bargaining agreement, will provide necessary direction from the Court on the enforcement of arbitration agreements contained in both individual and collective bargaining agreements.

A. Duffield's Employment With Robertson, Stephens

Respondent Tonyja Duffield ("Duffield") was a "sophisticated industry insider" (Appendix ("App.") at 78a) who had signed three prior arbitration agreements when, upon her hiring by Petitioner Robertson, Stephens & Co. ("Robertson, Stephens"), she again signed an application form known throughout the securities industry as a Form U-4. Paragraph 5 of the Form U-4 she signed reads as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . ..

App. at 10a. Duffield listed on her Form U-4 the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD") as organizations with which she was registered. *Id.*

The NYSE requires candidates for registration to agree to abide by the NYSE Constitution and Rules (CR 76, SER 555)[2] and has required employees of its member firms to arbitrate disputes with their employers since at least 1958. App. at 67a. NYSE Rule 347 provides:

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[2] "CR" refers to docket number in the court record below, and citations to "ER" and "SER" refer to the specified pages of Appellant's Excerpts of Record and Appellee's Supplemental Excerpts of Record, respectively.

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

App. at 10a.

After almost six years at Robertson, Stephens, Duffield resigned in April 1994 to work at another securities firm. (CR 77, SER 559 ¶ 4).

B. Duffield's Complaint

In January 1995, Duffield filed a complaint in federal court containing nine claims for relief. Her first claim seeks a declaration under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, that her agreements to arbitrate are not enforceable because, among other reasons, the 1991 Civil Rights Act precludes waiver of a judicial forum for Title VII and state statutory claims when the agreement is signed as a condition of employment. App. at 3a. Duffield's other claims for relief included alleged violations of Title VII, 42 U.S.C. §§ 2000e *et seq.*; California's Fair Employment and Housing Act, Cal. Gov't Code §§ 12900-12996 ("FEHA"); fraud and deceit; breach of contract; breach of the covenant of good faith and fair dealing; intentional infliction of emotional distress; and negligent infliction of emotional distress. App. at 12a.

C. The District Court's Orders

Duffield moved for partial summary judgment on her declaratory relief claim. The district court denied Duffield's motion for partial summary judgment on the grounds that (1) her arbitration agreement was not an unconstitutional condition of employment because there was no state action; (2) the NYSE arbitration scheme adequately protects Duffield's Title VII rights; and (3) Title VII as amended by the Civil Rights Act of 1991 did not preclude enforcement of arbitration agreements entered into as a condition of employment. App. at 68a-70a. Robertson, Stephens then moved to compel arbitration under the FAA and the NYSE Rules. The district court granted the motion, finding that (1) Duffield's agreement under the NYSE Rules was "knowing," and (2) it was not an unconscionable adhesion contract. App. at 80a, 82a. The district court certified its orders under 28 U.S.C. § 1292(b), and the Ninth Circuit accepted the appeal.

D. The Court of Appeals' Decision

Writing for the Ninth Circuit panel, Judge Stephen Reinhardt held that Duffield could not be compelled to arbitrate her Title VII and state statutory antidiscrimination claims, despite her agreement to do so, because Congress in passing the Civil Rights Act of 1991 intended to preclude enforcement of such agreements when they were entered into as a condition of employment. App. at 9a. The Ninth Circuit rejected the argument that the Civil Rights Act of 1991 "encouraged" arbitration and found support for its holding in the text of the 1991 Civil Rights Act, specifically Section 118 of that

Act, its legislative history, and the underlying purposes of Title VII and the 1991 Civil Rights Act.

1. The text of Section 118

Section 118 of the 1991 Civil Rights Act, Pub. L. 102-166, *reprinted in* notes to 42 U.S.C. § 1981 states:

> Where appropriate and to the extent authorized by law, the use of alternative dispute resolution including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and *arbitration* is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title. (Emphasis added.)

The Ninth Circuit construed the introductory phrase "[w]here appropriate" as meaning "where arbitration furthers the purpose and objective of the Act -- by affording victims of discrimination an *opportunity* to present their claims in an alternative forum, a forum that *they* find desirable -- not by forcing an unwanted forum upon them." App. at 32a. Next, the court asserted that the phrase "to the extent authorized by law" meant Congress' perception of the law "at the time Congress drafted § 118, and it was reported out of the House Education and Labor Committee." App. at 33a. The Ninth Circuit stated that at that point in time, based on this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the circuit courts "had 'widely interpreted' Title VII as prohibiting '*any form* of compulsory arbitration,' including in individual employment cases." App. at 34a (quoting *Prudential*

Insurance Co. v. Lai, 42 F.3d 1299, 1303 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995)).

According to the Ninth Circuit, the majority view of *Gardner-Denver* did not change until after Section 118 and the House Education and Labor Committee report were drafted, when this Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Based on this sequence of events, the court found that Congress had intended to codify the pre-*Gilmer* interpretation of *Gardner-Denver*.

2. The legislative history of Section 118

The Ninth Circuit found support for its interpretation of Section 118 in two House committee reports and certain selected statements made in the floor debate on the 1991 Civil Rights Act. The Ninth Circuit quoted from the House Committee on Education and Labor report the statement that the committee "believes that any agreement to submit disputed issues to arbitration, whether in the context of collective bargaining or in an employment contract, *does not preclude the affected person from seeking relief under the enforcement provisions of Title VII*." App. at 36a-37a. The court summarized its analysis of the legislative history as follows: "No statements were made in reports, on the floor, or by the President that contradicted" an intent to codify the pre-*Gilmer* judicial interpretation of *Gardner-Denver*. App. at 41a.

3. The purpose of the Civil Rights Act of 1991

The Ninth Circuit also relied on its view of the purpose of the 1991 Civil Rights Act to support its holding below. The court stated that the purpose of the Act was "uniformly to *expand* employees' rights and 'to *increase* the possible remedies.'" App. at 29a (quoting *Lai*, 42 F.3d at 1304). Thus, in the court's view, it was unlikely that

> Congress "encouraged" the use of a process whereby employers condition employment on their prospective employees' surrendering their rights to a judicial forum for the resolution of all future claims of race or sex discrimination and force those employees to submit all such claims to compulsory arbitration.

Id.[3] In light of the court's holding that Duffield's Form U-4 arbitration agreement was not enforceable as to Title VII and state antidiscrimination claims, the court did not reach Duffield's other challenges to arbitration of these claims. App. at 22a n.7. Addressing Duffield's only challenge to arbitration of her common law claims, the

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[3] The court in footnote 3 links Congress' intent as to Title VII to its intent as to all state statutory antidiscrimination claims:

> Duffield's . . . claims under Title VII appear to be identical to those she brings under the FEHA. Because "[p]arallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme," FEHA claims are arbitrable to the same extent as Title VII claims.

App. at 14a n.3 (citations omitted). The remainder of the decision does not address Duffield's FEHA claims.

Ninth Circuit rejected Duffield's argument that mandatory arbitration was an unconstitutional condition of employment because, like the district court, it found no state action. App. at 9a. Accordingly, the decision below affirmed the district court's order compelling arbitration of Duffield's state tort and contract claims. App. at 56a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF EVERY OTHER CIRCUIT COURT THAT HAS ADDRESSED THIS ISSUE.

The Ninth Circuit's holding that Congress intended to preclude waiver of a judicial forum in favor of an arbitral forum for statutory antidiscrimination claims conflicts with the decisions of all other circuit courts that have addressed the issue. The clearest example of the circuit split is the Third Circuit's recent decision in *Seus v. John Nuveen & Co.*, ___ F.3d ___, No. 97-1498, 1998 WL 294020 (3d Cir. June 8, 1998). Issued after the *Duffield* decision, the Third Circuit's decision considered the arbitrability of Title VII claims and expressly "disagree[d] with the decision of the Court of Appeals for the Ninth Circuit in *Duffield*." *See id.* at *8. The Third Circuit considered the enactment of Section 118 "more than six months after *Gilmer* was decided" and found that "[o]n its face, the text of [Section] 118 evinces a clear Congressional intent to encourage arbitration of Title VII and [Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA")] claims, not to preclude such arbitration." *Id.* at *8.

The Third Circuit in *Seus* specifically rejected the Ninth Circuit's conclusion that Section 118 "impliedly repealed [the FAA] with respect to agreements to arbitrate Title VII claims which were executed by an employee as a condition of securing employment." *Id.* The Third Circuit reasoned that Section 118's prefatory clause, "[w]here appropriate and to the extent authorized by law," should be read "as a reference to the FAA." *Id.* In examining the two House committee reports relied on in *Duffield*, the Third Circuit found "ample legislative history to support a straightforward reading of the text of [Section] 118," *id.* n.1, and "nothing . . . suggesting that this hortatory provision was intended to codify, and thus freeze, any particular view of the case law." *Id.* Finally, the Third Circuit declined to interpret "authorized by law" in a manner "inconsistent with a Supreme Court case decided six months before the passage of the Act." *Id.* *See also Mouton v. Metropolitan Life Insurance Co.*, __ F.3d __, 1998 WL 396827, *2 (5th Cir. July 31, 1998) (holding Title VII claims arising after 1991 Act arbitrable; recognizing conflict with *Duffield*).

At least four other circuit court decisions issued before the decision below squarely conflict with the Ninth Circuit decision by holding that Title VII or ADEA claims filed after the Civil Rights Act of 1991 are arbitrable:

Fourth Circuit. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996) (collecting cases surveyed and noting that "[e]very [circuit] case decided . . . under [Section] 118 of the 1991 amendments to the Civil Rights Act has enforced anticipatory agreements to arbitrate claims

involving statutory rights"). Enforcing an agreement to arbitrate Title VII claims pursuant to a collective bargaining agreement's arbitration provisions, the court stated: "The language of [Section 118] could not be any more clear in showing Congressional favor towards arbitration." *Id.* at 881.

Seventh Circuit. *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 54 n.4 (7th Cir. 1995) (holding ADEA claims arbitrable and stating that "the Civil Rights Act of 1991 encouraged the use of arbitration to resolve ADEA claims") (citing Section 118).[4]

Eighth Circuit. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) ("the arbitrability of Title VII claims finds support in the Civil Rights Act of 1991" based on Section 118, which "encourage[s]" arbitration).

District of Columbia Circuit. *Cole v. Burns Inter. Security Services*, 105 F.3d 1465, 1472-73 (D.C. Cir. 1997) (enforcing mandatory agreement to arbitrate Title VII claims). The District of Columbia Circuit held that *Gilmer* required enforcement of agreements signed "*as a condition of employment*, to forego all access to jury trials and . . . to use arbitration in place of judicial fora for the resolution of statutory as well as contractual claims."[5]

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[4] The ADEA, along with Title VII, was among the statutes amended by the Civil Rights Act of 1991. The ADEA is thus subject to Section 118 of the 1991 Act.

[5] The decision below also conflicts with decisions of the highest state courts of New York and the District of Columbia. *See Benefits Communications v. Klieforth*, 642 A.2d 1299, 1304 (D.C. 1994) ("We find nothing in [Section

One circuit that has not yet addressed the effect of Section 118 on the arbitrability of Title VII claims -- the First -- has enforced mandatory arbitration agreements as to claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12212, based on a provision virtually identical to Section 118 which "encourage[s]" arbitration "[w]here appropriate and to the extent authorized by law." *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 149 (1st Cir. 1998) (if ADA provision "encourag[ing]" arbitration "were not interpreted to permit prospective waiver of a judicial forum, it would be superfluous."). *See also Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215, 218 (5th Cir. 1997) (ADA's arbitration provision "persuasively demonstrates that Congress did not intend to exclude the ADA from the scope of the FAA").[6]

118] which can be construed as modifying or undermining the holding of *Gilmer.*"); *Fletcher v. Kidder, Peabody & Co.*, 619 N.E.2d 998 (N.Y.) (Section 118 and its legislative history do not show "congressional intent to override the general rule that anticipatory contracts to arbitrate are enforceable under the FAA"), *cert. denied*, 114 S. Ct. 554 (1993). The federal district courts are divided on the issue. *Compare EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 504 (E.D. Mich. 1997) (enforcing agreement to arbitrate Title VII claim after 1991 Act) *with Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 1991 WL 81907 (D. Mass. Jan. 26, 1998) (holding post-1991 Act Title VII claim not arbitrable). The First Circuit heard oral argument in *Rosenberg*, No. 98-1246, on July 27, 1998.

[6] In addition, four circuits other than the Ninth Circuit have held that agreements to arbitrate entered into as a

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARBITRATION CASES AND IS IN ERROR.

A. The Ninth Circuit Failed to Follow *Gilmer*.

The Ninth Circuit decision in this case conflicts squarely with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The facts and issues in *Gilmer* are virtually indistinguishable from *Duffield*. Like Duffield, Gilmer was "an experienced business[person]" who signed a Form U-4 in which he agreed to arbitrate any employment dispute pursuant to NYSE arbitration procedures. 500 U.S. at 33. Gilmer filed a federal complaint alleging violation of the ADEA and argued that he should not be compelled to arbitrate the claim, despite his agreement to do so, because arbitration was inconsistent with the purpose of the ADEA. *Id.* at 27.

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condition of employment are enforceable with respect to pre-1991 Civil Rights Act claims under Title VII: *Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons*, 971 F.2d 698, 700 (11th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991). Even the Ninth Circuit has held in prior decisions that Title VII claims, both before and after the 1991 Civil Rights Act, were subject to arbitration agreements entered into as a condition of employment. *See Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994) (post-1991 Act claim); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (pre-1991 Act claim).

In rejecting Gilmer's argument, the Court found that notwithstanding the "important social policies" of the ADEA, there was no "inherent inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims." *Id.* The Court also rejected Gilmer's arguments that NYSE arbitration procedures were inadequate (*id.* at 30-31) and that the arbitration agreement was the result of unequal bargaining power (*id.* at 32-33). Finally, the Court in *Gilmer* distinguished *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that arbitration of Title VII claims pursuant to a collective bargaining agreement did not preclude the claimant from bringing those claims in federal court. The *Gilmer* Court held that *Gardner-Denver*'s rationale, based on the contractual rights protected in the collective bargaining setting, did not apply to individual agreements to arbitrate statutory claims. *Id.* at 35.

By the time *Gilmer* was decided, it was "clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." 500 U.S. at 26.[7] As this Court stated: "'[H]aving made the bargain

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[7] *Gilmer* followed a trilogy of cases in which the Court applied the presumption under the FAA that important federal statutory rights and policies were subject to mandatory arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act antitrust claims are arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under SEC Rule 10b-5 and Racketeer Influenced and Corrupt Organization Act are arbitrable); *Rodriguez de Quijas v. Shearson/American Express, Inc.*,

to arbitrate, the party should be held to it unless Congress itself has *evinced* an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628) (emphasis added). By placing the burden of establishing such congressional intent on the party opposing arbitration, *id.*, and by using the word "evince," meaning to "show or demonstrate clearly" (*American Heritage Dictionary* at 636 (3d ed. 1992)), the Court reveals the rigorousness of this standard. This Court has never found a statutory claim exempt from the requirements of the FAA under this standard.

The conflict between *Duffield* and *Gilmer* arises both from the Ninth Circuit's disregard of the FAA's presumption of arbitrability and the court's mistaken view that arbitration involves a waiver of substantive rights. The decision below asserts that Congress could not have intended, in a statute designed "to strengthen existing protections and remedies," to allow an agreement as a condition of employment "surrendering [employees'] rights to a judicial forum for the resolution of all future [discrimination] claims . . . and force those employees to submit all such claims to compulsory arbitration." App. at 29a-30a. As this Court determined in *Gilmer*, however, agreements to arbitrate "do[] not forgo the substantive rights afforded by the statute" but merely constitute a change in fora. 500 U.S. at 26.

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490 U.S. 477 (1989) (claims under the Securities Act of 1933 and Securities and Exchange Act of 1934 are arbitrable).

Gilmer found mandatory arbitration consistent with the purposes of the ADEA. No meaningful distinction exists in this context between Title VII and the ADEA. As this Court and others have found, the ADEA and Title VII are similar statutory schemes. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992). Nor has the 1991 Civil Rights Act changed the fundamental purpose of Title VII. *See Joyner v. Monier Roof Tile, Inc.*, 784 F. Supp. 872, 879 (S.D. Fla. 1992).[8]

The Ninth Circuit's strained reading of the text of Section 118 provides further evidence of its rejection of *Gilmer*. The phrase "[w]here appropriate," according to the Ninth Circuit, means where arbitration is the forum chosen by plaintiffs, not "forc[ed] . . . upon them." App. at 32a. Thus, the Ninth Circuit concluded, Congress meant to "encourage[ ]" only *post*-dispute agreements to arbitrate. *Id.* This contradicts the holding in *Gilmer* that a pre-dispute "compulsory arbitration" agreement entered into as a condition of employment was enforceable (500 U.S. at 23) and ignores the admonishment, based on the dictates of the FAA, that having made the bargain to arbitrate the agreement is enforceable "'save upon such

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[8] The creation in the 1991 Civil Rights Act of the right to a jury trial for Title VII claims does not change the analysis. The right to a jury trial for ADEA claims was clearly established 13 years before *Gilmer*, *see Lorillard v. Pons*, 434 U.S. 575, 577 (1978), yet this Court in *Gilmer* found arbitration fully consistent with the purpose of the ADEA.

grounds as exist at law or in equity for the revocation of any contract.'" 500 U.S. at 33 (quoting 9 U.S.C. § 2)).

B. The Ninth Circuit Decision in *Duffield* Is in Error.

In addition to conflicting with this Court's decisions in *Gilmer* and other cases under the FAA, the holding below errs by misreading the language of Section 118, its legislative history, and the purpose of the Civil Rights Act of 1991.

1. The 1991 Civil Rights Act Promotes, Rather Than Precludes, the Use of Arbitration to Resolve Disputes Under the Act.

a. Section 118 "encourage[s]" arbitration.

The Ninth Circuit's reading of the text of Section 118 of the Civil Rights Act of 1991 is contrary to the plain meaning of the text in at least two respects.

First, the Ninth Circuit's conclusion that the phrase "[w]here appropriate" means where arbitration has not been "forc[ed]" on the plaintiff finds no support in the 1991 Civil Rights Act or Title VII. The Ninth Circuit ignores the most sensible meaning of the phrase, which, in context, refers to a laundry list of alternative means of dispute resolution: "settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration." Which of these forms of Alternative Dispute Resolution ("ADR") is "appropriate" varies from case to case, depending on numerous factors, including the number of parties, the ability of the parties to pay, whether the parties are represented by counsel, the size of

the monetary claim, scheduling issues, and the existence of an arbitration agreement.

Second, the Ninth Circuit erroneously concluded that "to the extent authorized by law" means Congress' perception of the law "at the time Congress ***drafted*** § 118, and it was reported out of the House Education and Labor Committee." App. at 33a (emphasis added). As the Third Circuit recently noted in *Seus v. John Nuveen & Co.*, 1998 WL 294020 (3d Cir. June 8, 1998), this statutory language does not show an intent to codify any particular view of the law. *Id.* at *8. The most natural reading of this clause, as the Third Circuit and every other circuit court to consider the issue have held, is that it does not establish an *independent* limitation on the use of alternative means of dispute resolution, but rather acknowledges that *other* laws, such as the FAA, may govern the applicability of certain forms of ADR.[9]

The Ninth Circuit's insupportable proposition that Congress intended to freeze the state of the law at a time six months prior to final passage of the Act is counter to the well-established canon that Congress is presumed to know the law when it enacts legislation and to adopt existing judicial interpretations when it enacts or amends statutes. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 1998 WL 336322, at *11 (U.S. June 26, 1998) (in the

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[9] For example, while private settlement -- one of the ADR options listed in Section 118 -- is generally available for claims between individual parties participating in litigation, Federal Rule of Civil Procedure 23(e) requires court approval for settlement of a class action.

1991 Civil Rights Act, Congress is presumed to adopt judicial interpretations related to the subject of the 1991 amendments *unless* Congress modified the Court's holdings in those amendments); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

The timing of *Gilmer* and the passage of the 1991 Civil Rights Act does not support the Ninth Circuit's conclusion that Section 118 demonstrated congressional intent to repeal *Gilmer*. Contrary to the assertion by the court below that Congress passed the 1991 Civil Rights Act "[a]lmost simultaneously" with the issuance of *Gilmer*, this Court's decision in *Gilmer* precedes passage of the 1991 Civil Rights Act by nearly six months. Ample time occurred after this Court issued the *Gilmer* decision on May 13, 1991 and before the final passage of the 1991 Civil Rights Act on November 7, 1991 for Congress to amend the Act to abrogate *Gilmer*, if it had wanted to do so.

Indeed, Congress in the 1991 Civil Rights Act expressly abrogated two Supreme Court cases decided in March of that year -- *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), and *EEOC v. Arabian American Oil Company*, 499 U.S. 244 (1991) -- while the Act was pending in Congress. These cases were overruled by an amendment to H.R. 1 which passed the House on June 5, 1991. *See* 137 Cong. Rec. H3950 (daily ed. June 5, 1991) (statement by Rep. Edwards that the amendment "adds two new sections to reverse Supreme Court decisions announced after committee consideration of this year's bill"). By contrast, Congress did not consider any

amendment to the 1991 Civil Rights Act after *Gilmer* issued on the subject of mandatory arbitration.

The Ninth Circuit erroneously asserted that "at the time the 1991 Act was enacted it was still at least *an open question* whether *Gilmer* applied to Title VII claims." App. at 34a (emphasis added). This assertion ignores several important court decisions issued prior to passage of the 1991 Civil Rights Act holding that *Gilmer* applied to Title VII claims. Soon after announcing its decision in *Gilmer*, this Court vacated the Fifth Circuit's decision in *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990), which held that a Title VII claim was not arbitrable and remanded the case for further consideration in light of *Gilmer*. *Dean Witter Reynolds, Inc. v. Alford*, 500 U.S. 930 (1991). The Fifth Circuit held on remand that *Gilmer* applied to Title VII. *See Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (decided Aug. 2, 1991). Several state and federal district courts across the country had also held, prior to passage of the 1991 Civil Rights Act, that *Gilmer* applied to Title VII or related state antidiscrimination statutes.[10] Certainly, in the six months

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[10] *See, e.g., Kaliden v. Shearson Lehman Hutton, Inc.*, 789 F. Supp. 179 (W.D. Pa. 1991) (Pennsylvania Human Relations Act claim) (decided Aug. 14, 1991); *Nelsen v. Colleary*, 574 N.Y.S.2d 912 (N.Y. Sup. 1991) (sex harassment claim under New York Human Rights Law) (decided Sept. 23, 1991); *Higgins v. Superior Court*, 234 Cal. App. 3d 1464 (1991) (sex discrimination claim under FEHA and Title VII claim) (decided Oct. 8, 1991), *depublished* Jan. 8, 1992. On the same day as Congress passed the 1991 Act, the Sixth Circuit joined the Fifth in

prior to passage of the 1991 Civil Rights Act, no court had held that *Gilmer* did *not* apply to Title VII claims. These decisions demonstrate the growing consensus around the country that *Gilmer* applied to Title VII claims. *See Thompson v. Thompson*, 484 U.S. 174, 180 (1988) (assuming Congress' view of the law to be the lower courts' consensus where this Court has not spoken to the contrary).

b. The legislative history of Section 118 does not evince congressional intent to preclude arbitration.

The Ninth Circuit erroneously found, based on scant evidence from two House committee reports and selected comments of individual legislators, that Congress evinced its intent to preclude a waiver of a judicial forum for Title VII claims. As a threshold matter, the Ninth Circuit had no need to reach the legislative history. *Gilmer* did not, in its reference to searching for Congressional intent in the legislative history, alter the long-standing rule that legislative history has no role in statutory construction where the text is clear and unambiguous. *Salinas v. United States*, 118 S. Ct. 469, 474 (1997). Section 118's unambiguous "encourage[ment]" of arbitration precludes any need to seek the assistance of legislative history to resolve this issue. *Seus*, 1998 WL 294020, at *8; *Austin*, 78 F.3d at 881.

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holding that *Gilmer* applied to Title VII claims. *See Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991).

Nonetheless, an examination of the relevant legislative history shows that it provides no clear evidence of congressional intent to preclude arbitration. The House Committee Report on Labor and Education states, as quoted by the Ninth Circuit: "The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available." App. at 37a. The Ninth Circuit's conclusion that this statement shows Congress' intent to preclude arbitration ignores this Court's teaching that an arbitration agreement "does not forgo the substantive rights afforded by the statute" and "the NYSE rules applicable here do not restrict the types of relief an arbitrator may award." *Gilmer*, 500 U.S. at 26, 32.

The Ninth Circuit ultimately resorts to the least reliable indicia of legislative intent -- the stray comments of individual legislators. App. at 40a-41a. *Garcia v. United States*, 469 U.S. 70, 76 (1984). The Ninth Circuit, however, ignores *two* citations to *Gilmer* in the floor debate endorsing mandatory arbitration. Sen. Dole and Rep. Hyde both said:

> In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole); 137 Cong. Rec. H 9505, H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde). The Ninth Circuit's selective survey is nothing other than the practice described by Justice Breyer as "'looking over a

crowd and picking your friends.'" Stephen Breyer, *On the Uses of Legislative History in the Interpretation of Statutes*, 65 S. Cal. L. Rev. 845, 845-46 (1992) (quoting Judge Leventhal).

c. Arbitration is consistent with the purpose of the 1991 Civil Rights Act.

The decision below found that arbitration was inconsistent with the purpose of the 1991 Civil Rights Act. Based on its view that the purpose of the 1991 Civil Rights Act was to expand employees' rights and remedies, the Ninth Circuit reasoned that it would be "'at least a mild paradox'" to conclude that Congress in Section 118 "encouraged" mandatory arbitration as a condition of employment. App. at 29a. Just as legislative history cannot be used to contradict the text of a statute, the Ninth Circuit's embellished view of the purpose of the 1991 Civil Rights Act cannot accomplish this purpose. The *Duffield* panel simply disagrees with the Congressional choice to "encourage[ ]" arbitration. Of course, Congress' view as expressed in the FAA and the text of Section 118, and not that of the Ninth Circuit panel, is controlling on the issue.

2. No Support Exists for the Ninth Circuit's Conclusion that Congress Evinced its Intent to Preclude Arbitration of State Statutory Antidiscrimination Claims.

In addressing Duffield's claim under California's Fair Employment and Housing Act, the Ninth Circuit concluded, without analysis, that "FEHA claims are arbitrable to the same extent as Title VII claims" because

"state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme." App. at 14a n.3. The Ninth Circuit supports this sweeping conclusion with citations to two cases, neither of which involves the arbitration of state statutory claims.[11]

In its text and legislative history, the 1991 Civil Rights Act never mentions the arbitrability of state antidiscrimination statutes. By its terms, Section 118 only applies to "disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. 102-166, § 118. In light of this express restriction (and regardless of any conclusions reached with respect to Title VII claims), no basis exists for the Ninth Circuit's conclusion that Congress evinced its intent to preclude arbitration of state statutory antidiscrimination claims. *See Gilmer*, 500 U.S. at 26 (under the FAA, burden is on plaintiff to demonstrate that Congress intended to preclude arbitration of the statutory claim at issue). In fact, numerous state cases applying the FAA have enforced mandatory arbitration agreements with respect to claims under FEHA and other state antidiscrimination statutes. *See, e.g., Brookwood v. Bank of America*, 45 Cal. App. 4th 1667, 1674 (1996); *Fletcher v. Kidder, Peabody & Co.*, 619 N.E.2d 998, 1003 (N.Y.), *cert. denied*, 510 U.S. 993 (1993).

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[11] *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467-77 (1982) (state court decisions on state nondiscrimination statutory claim entitled to preclusive effect on Title VII claims); *Salgado v. Atlantic Richfield*, 823 F.2d 1322, 1326 (9th Cir. 1987) (addressing tolling of statute of limitations for FEHA claim).

III. THE COURT SHOULD RESOLVE THIS CIRCUIT SPLIT BECAUSE IT IS VITALLY IMPORTANT TO EMPLOYERS, EMPLOYEES, AND COURTS NATIONWIDE.

The issue of arbitrability of Title VII and state antidiscrimination claims is of immediate and vital concern to employers, employees, and the federal and state courts throughout the country. Although this case arose in the securities industry, its impact is far broader. The question considered below affects every agreement between employers and employees to arbitrate Title VII and state antidiscrimination claims in nearly every sector of the economy. *See* App. at 46a-47a.

A. This Question Significantly Affects Employers and Employees Throughout the Country.

Since this Court's decision in *Gilmer*, a growing number of employers have instituted arbitration procedures for employment disputes. A 1994 General Accounting Office survey of private businesses found that about 10% of employers had arbitration procedures in place for discrimination complaints. U.S. General Accounting Office, *Employment Discrimination: Most Private-Sector Employers use Alternative Dispute Resolution* at 7 (GAO/HEHS-95-150).[12]

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[12] Although specific data for more recent years is not available, since 1994 arbitration has become more popular. *See* U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace* at 14 (GAO/GGD-97-157) ("ADR In the Workplace").

Arbitration has grown in popularity in direct response to the increasing strain of employment litigation on court dockets and, as cases drag on for months and years, litigants. The number of employment discrimination lawsuits filed in federal courts nearly doubled in four years, from 12,962 in fiscal year 1993 to 23,796 in fiscal year 1997. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts: 1997 Report of the Director* 132 (1998). Meanwhile, during that same period, the median time to trial for a civil suit in the federal courts increased more than 18% to 19 months. *Id.* at 175; Administrative Office of the U.S. Courts, *United States Courts: Selected Reports 1993* at A1-102 (1994). To cope with this growing burden, the federal courts promote the diversion of cases to alternative means of dispute resolution, including arbitration. Judicial Conference of the United States, *Long Range Plan for the Federal Courts* at 134 (1995).

Apart from its effect on local and regional companies, the *Duffield* decision burdens the thousands of nationwide employers with operations in the Ninth Circuit. In the securities industry alone, where arbitration of employment disputes is commonplace, more than 100 securities firms with offices within the Ninth Circuit also have offices within other circuits. *See Standard & Poor's Security Dealers of North America* (1998). These nationwide employers require a uniform rule in order to obtain the full benefits of arbitration. The *Duffield* decision imposes unique costs on businesses that have invested in nationwide ADR programs. A major motivation for arbitration of discrimination claims is the reduction of costs in terms of time and legal fees. *See ADR In the*

Workplace at 8. For example, Houston-based Brown & Root, Inc. instituted mandatory arbitration for its 27,000 U.S. employees after the company spent $400,000 in legal fees to successfully defend itself in one discrimination suit. *Id.* at 39. The arbitration program has reduced the company's legal fees by 90% while still providing a neutral forum for enforcement of employees' statutory and common law rights. *Id.* at 40.

After *Duffield*, a nationwide employer will continue to bear the cost of administering its ADR program for employees outside the Ninth Circuit.[13] Now, however, that employer must make a difficult choice. It must either exclude employees within the Ninth Circuit from arbitration -- leading to differing personnel policies depending on the employee's location -- or bear the added cost of arbitration *and* litigation, often in the same case. In the present litigation, by way of example, Duffield brings state tort and contract claims, which are clearly arbitrable, and Title VII and state antidiscrimination claims, which the Ninth Circuit deemed non-arbitrable. Because both the arbitrable and non-arbitrable claims involve the same facts and witnesses, the Ninth Circuit decision imposes the additional cost of duplicative proceedings on the parties. Bifurcated claims will not be unique to this case. Claims for age discrimination (arbitrable under *Gilmer*) coupled with claims for sex

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[13] Depending on the nature of the program, these costs may be substantial. Brown & Root's ADR program had an annual budget of $500,000 in 1997. *See ADR In the Workplace* at 40.

discrimination under Title VII would also result in dual arbitral-judicial proceedings. Such bifurcation imposes inefficiencies and costs on resolution of employment disputes within the Ninth Circuit and is contrary to the federal policy in favor of arbitration.

B. The Ninth Circuit's Treatment of State Discrimination Claims Has Equally Broad Effect.

The *Duffield* decision sweeps within its ambit the fair employment statutes adopted by nearly every state and the District of Columbia. 8A Lab. Rel. Rep. (BNA) ¶ 451:1 (1995). Many employment disputes involve only state statutory claims (*see, e.g.*, *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) (FEHA claims)) or, like the instant case, both state and federal statutory claims. The *Duffield* decision's prohibition on the arbitration of state statutory claims is as significant a burden on the FAA's pro-arbitration policy as is the court's ruling regarding Title VII claims.

C. Courts and Practitioners Are Actively Litigating This Question and Closely Tracking This Case.

As indicated by the quick response of other circuit and trial courts to the *Duffield* decision, courts and parties to employment disputes are currently expending considerable efforts litigating this precise question around the country. *See, e.g., Seus*, 1998 WL 294020, at *8 (rejecting *Duffield*); *Winkler v. Pacific Brokerage Servs., Inc.*, No. 97 C 7340, 1998 WL 341622 (N.D. Ill. June 19, 1998) (following *Duffield*). Even where courts ultimately enforce agreements

to arbitrate, the effort spent to obtain this result negates the primary benefits of arbitration -- swiftness and economy. Much additional litigation in the lower courts could be avoided by resolution of the circuit split by this Court.[14]

The widespread interest in the arbitrability of Title VII claims is further demonstrated by the attention this case has drawn from many quarters. Twelve amici curiae, including the U.S. Equal Employment Opportunity Commission, filed nine briefs in this case in the Ninth Circuit.[15] In addition, major daily newspapers and legal publications have written about the sweeping effect of the *Duffield* decision. The *Los*

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[14] Widespread litigation will continue, regardless of the decision of the NASD not to require as a condition of registration that brokers and traders arbitrate statutory discrimination claims filed on or after January 1, 1999. 63 Fed. Reg. 35299, 35301 (June 29, 1998) (SEC Release No. 34-40109). Even if the NYSE were to propose amending its rule to conform with the new NASD rule, the issue decided in the court below would remain critical because, among other reasons, the Ninth Circuit's holding applies to arbitration agreements entered into as a condition of employment in *all* industries.

[15] The EEOC filed an amicus curiae brief on behalf of Duffield. Briefs amici curiae were filed in support of Duffield by the National Academy of Arbitrators, the National Employment Lawyers Association, Concerned Legal Scholars and Lawyers' Committee for Civil Rights Under Law (joined in by, among others, the NAACP Legal Defense and Educational Fund, Inc.). Robertson, Stephens' amici were the Equal Employment Advisory Council, California Employment Law Council, The Employers Group, and the Securities Industry Association.

Angeles Times quoted one law professor as stating that the *Duffield* decision "could affect millions of workers" in virtually every industry. *See* Henry Weinstein, "Decision Frees Workers from Mandatory Arbitration Rule; Labor: the Appeals Court Action, Allowing a Woman to Pursue Bias Claim in a Lawsuit, Could Affect Millions," *Los Angeles Times* at D1 (May 12, 1998).

CONCLUSION

For all of the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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August 4, 1998

APPENDICES

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONYJA DUFFIELD, *Plaintiff-Appellant*, v. ROBERTSON STEPHENS & COMPANY, a partnership; ROBERTSON STEPHENS & COMPANY, a corporation, *Defendants-Appellees*.	No. 97-15698 D.C. No. C-95-0199-EFL OPINION

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

Argued and Submitted
March 9, 1998—San Francisco, California

Filed May 8, 1998

Before: William C. Canby, Jr. and Stephen Reinhardt, Circuit Judges, and Jane A. Restani, Court of International Trade Judge.*
Opinion by Judge Reinhardt

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*Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

SUMMARY

Labor and Employment/Arbitration

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that under the Civil Rights Act of 1991, a securities firm cannot require prospective broker-dealer employees to waive their right to bring employment-related suits under Title VII of the Civil Rights Act of 1964 and agree in advance to compulsory arbitration.

The securities industry requires those who work as broker-dealers to waive their right to a judicial forum and to resolve all employment-related disputes by arbitration, as mandated by the rules of the national securities exchanges. Prospective employees satisfy this requirement by signing the industry's "U-4" form, which provides that the employee agrees to submit such disputes to arbitration under the rules, constitutions, and bylaws of all organizations with which the employee registers.

When appellant Tonyja Duffield went to work for appellee Robertson Stephens and Company in 1988, she listed on her Form U-4 the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD), the exchanges of which Robertson Stephens is a member. Both the NYSE and the NASD have rules (NYSE Rule 347 and NASD Code of Arbitration Procedure § 1) that compel employees to arbitrate employment-related disputes at the request of their employees.

In 1995, Duffield sued Robertson Stephens in federal court, alleging sexual discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, California's Fair Employment and Housing Act, and several tort and contract claims. She also requested a declaration that securities industry employees cannot be compelled to arbitrate employment disputes under the provisions of form U-4.

The district court rejected Duffield's claims and granted Robertson Stephens' motion to compel arbitration. The court certified the case for immediate appeal.

On appeal, Duffield contended: (1) that Form U-4's compulsory arbitration provision is not a voluntary agreement within the meaning of Title VII; (2) signing Form U-4 does not constitute a "knowing" agreement to arbitrate within the meaning of Title VII; (3) the NYSE's arbitration system does not adequately protect the substantive rights of employees under Title VII; (4) Form U-4 is a contract of adhesion because it forces employees to arbitrate Title VII claims under an inadequate arbitration system; and (5) with respect to her state-law and contract claims, the industry's mandatory arbitration requirement is an unconstitutional condition of employment.

[1] Section 118 of the Civil Rights Act of 1991 states that "where appropriate and the extent authorized by law," parties may opt to pursue alternative dispute resolution, including arbitration, to resolve their Title VII disputes. [2] In passing the 1991 Act, Congress explicitly directed courts that when the terms of Title VII are susceptible to alternative interpretations, courts are to select the construction that most effectively advances, the congres-

sional purpose of the act to *expand* employees' rights and to *increase* the remedies available to civil rights plaintiffs. Congress meant to encourage *voluntary* agreements to arbitrate—agreements such as those employers and employees enter into after a dispute has arisen because *both* parties consider arbitration to be a more satisfactory or expeditious method of resolving the disagreement.

[3] In § 118, Congress intended to encourage arbitration only under circumstances or conditions it deemed legally permissible *and* appropriate. [4] "Where appropriate" appears to mean where arbitration furthers the purpose and objectives of the Act—by affording victims of discrimination an *opportunity* to present their claims in an alternative forum that *they* find desirable-- not by forcing an unwanted forum on them. [5] "To the extent authorized by law" most likely codifies the law as Congress understood it at the time it drafted or passed the provision. The overwhelming weight of the law at the time Congress drafted § 118 and it was reported out of committee was to the effect that compulsory agreements to arbitrate Title VII claims are unenforceable.

[6] Section 118's legislative history made it clear that Congress in no way intended to authorize compulsory arbitration of Title VII claims. Its expressed intent was precisely the opposite. [7] Congress concluded that all mandatory agreements to submit disputed issues to arbitration as conditions of employment are "inappropriate" and therefore unenforceable. [8] In fact, Congress specifically rejected a proposal that would have allowed employers to enforce compulsory arbitration agreements.

[9] Form U-4 is unenforceable as applied to Title VII claims, and is precisely what Congress intended to prohibit in the 1991 Act: mandatory requirements under which prospective employees agree as a condition to employment to surrender their rights to litigate future Title VII claims in a judicial forum and accept arbitration instead. Form U-4 is a take-it-or-leave-it offer for anyone wishing to work as a broker-dealer in the securities industry. It forces individuals to opt for one of two "choices": sign or seek another profession. That sort of dilemma is fundamentally at odds with § 118, which was intended to deter employment discrimination by *increasing* claimants' choice of fora.

[10] *After a claim has arisen*, employees may believe that arbitration is preferable to litigation and willingly make that choice. Those plaintiffs are encouraged to resolve their employment disputes in that manner, and if they choose to do so, are bound by the arbitrator's decision.

[11] A threshold requirement of any constitutional claim is the presence of state action. However, this requirement does not restrict the application of the Constitution solely to governmental entities. Private entities like the NYSE and the NASD may be held to constitutional standards if their actions are "fairly attributable" to the state.

[12] The rules of the NYSE and the NASD are not fairly attributable to the government unless they carry the force of federal law. Prior to 1993, no federal statute or regulation required Duffield to register with the securities exchanges, much less sign Form U-4, or to arbitrate

employment disputes. When Duffield signed her Form U-4 in 1988, she did not do so because of any state action. [13] However, in 1993, the Securities and Exchange Commission (SEC) adopted a regulation requiring broker-dealers to be registered with at least one of the securities organizations of which Duffield's firm was a member. That regulation operates as federal law.

[14] State action can be present only to the extent that there is a sufficiently close nexus between the state and the challenged action. No federal law required Duffield to waive her right to litigation employment-related disputes by signing the Form U-4 in 1988, and no state action was present in simply enforcing that agreement.

[15] The SEC did not exercise sufficient influence over the compulsory arbitration requirement in Form U-4, the NASD procedures, or NYSE rules to deem that requirement the choice of the state. [16] The touchstone of state action in the context of governmental oversight is whether the government has moved beyond mere approval of private action into encouragement, endorsement, and participation of that action. [17] Duffield failed to put forth any example of governmental encouragement or endorsement of the compulsory arbitration requirement. The SEC's involvement was insufficient to render the industry's overall requirement that its employees submit to arbitration in lieu of court proceedings fairly attributable to the state.

[18] Since dispute resolution is not an exclusive governmental function, neither private arbitration nor the judicial act of enforcing it constitutes state action. The 1991 Civil Rights Act's allowance of voluntary, private arbitra-

tion agreements foreclosed the assertion that civil rights statutes should be exempted from this general rule.

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OPINION

REINHARDT, Circuit Judge:

This case presents the issue whether employers may require as a mandatory condition of employment in a certain profession — here, broker-dealer in the securities industry — that all employees waive their right to bring Title VII and other statutory and non-statutory claims in court and instead agree in advance to submit all employment-related disputes to binding arbitration. We hold that, under the Civil Rights Act of 1991, employers may not by such means compel individuals to waive their Title VII right to a judicial forum. At the same time, we hold that because no state action is involved there is no constitutional bar to employers requiring employees to agree in advance to arbitrate state-law tort and contract claims (other than for violation of a state civil rights law).

I

Like every individual who wishes to work in the United States as a broker-dealer in the securities industry, Tonyja Duffield was required, as a condition of employment mandated by the national securities exchanges, to waive her right to a judicial forum to resolve all "employment related" disputes and to agree instead to arbitrate any such disputes under the exchanges' rules. Prospective employees must satisfy this condition by signing the industry's Uniform Application for Securities Industry Registration or Transfer, commonly known as Form U-4, which registers them with all of the securities exchanges with which their employers are members. Paragraph 5 of Form U-4, the arbitration clause, reads as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

Because Robertson Stephens & Co. is a member of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), Duffield's "item 10" listed both of those organizations, and the form obligated her to abide by their rules, constitutions, and by-laws.

Both the NYSE and the NASD have rules that compel employees to arbitrate any employment-related dispute at the request of their employers. NYSE Rule 347 provides:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

The NASD Code of Arbitration Procedure, as amended in 1993, provides:

> [A]ny dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employ-

ment or termination of associated person(s) with any members ... shall be arbitrated.

Id. at Part 1, § 1.[1] After signing her Form U-4 in 1988, Duffield began working as a broker-dealer for Robertson Stephens.

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[1]After Duffield filed her opening brief in this case, the NASD voted to eliminate its mandatory arbitration requirement with regard to civil rights claims. The organization's proposal, which cannot be formally implemented until the Securities and Exchange Commission approves it, would mandate three basic changes in the current rule: (1) it would "permit employees to choose between entering into private arbitration agreements with their employers, or reserving the right to file a case in federal or state court for statutory discrimination claims"; (2) it would guarantee heightened procedural protections in arbitration by requiring forums that satisfy the standards in the ABA's "Due Process Protocol"; and (3) it would provide "enhanced disclosure [of the arbitration rules] to employees." *NASD Proposes Eliminating Mandatory Arbitration of Employment Discrimination Claims for Registered Brokers*, NASD Press Release, August 7, 1997; *see also* Deborah Lohse, *NASD Votes to End Arbitration Rule in Cases of Bias*, Wall St. J., August 8, 1997, at B14 (reporting NASD policy change, but noting that "mandatory arbitration is apt to continue, industry experts say, because the NASD is not forbidding firms from including arbitration requirements in their employment contracts"). This probable change in NASD's rules in no way affects the dispute in this case, however. Furthermore, nothing in the record suggests that the NYSE is reconsidering its rule.

In January, 1995, Duffield brought suit in federal court, alleging sexual discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and California's Fair Employment and Housing Act (FEHA), breach of contract, deceit, intentional infliction of emotional distress, and negligent infliction of emotional distress. As a threshold matter, she requested a declaratory judgment stating that securities industry employees cannot be compelled to arbitrate their employment disputes under the arbitration provision in Form U-4. She made five specific arguments in this regard: (1) that the "compulsory" arbitration requirement mandated by Form U-4 does not constitute a voluntary agreement to arbitrate within the meaning of Title VII; (2) that signing Form U-4 does not constitute a "knowing" agreement to arbitrate within the meaning of Title VII; (3) that the NYSE's arbitration system fails adequately to protect employees' substantive Title VII rights; (4) that Form U-4 is an unconscionable contract of adhesion because it forces her to arbitrate her Title VII claims under an inadequate arbitration system; and (5) that the industry's mandatory arbitration requirement constitutes an unconstitutional condition of employment. Only in connection with her final argument did Duffield contest the arbitrability of her state law and contract claims.

After allowing extensive discovery on the securities industry's arbitration system, the district court rejected each of Duffield's arguments. It first denied her motion for summary judgment on her declaratory relief claim, and later granted Robertson Stephens' motion to compel arbitration of all of her substantive claims. The court declined

to enter final judgment pursuant to Fed.R.Civ.P. 54(b) on Duffield's declaratory judgment claim, but certified both of its orders for immediate appeal pursuant to 28 U.S.C. § 1292(b).

On appeal, Duffield renews all five of her arguments below. We review de novo both the district court's denial of Duffield's motion for summary judgment, *Curnow v. Ridgecrest Police*, 952 F.2d 321, 323 (9th Cir. 1991), and its order compelling arbitration. *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986). In Part II, we address Duffield's contentions that are unique to her Title VII claims, and in Part III we consider her constitutional challenge to Form U-4.

II

The security industry's Form U-4 requires employees to submit to a system that is most fittingly described as "compulsory arbitration." Throughout this opinion when we use the term "compulsory arbitration," we generally refer to the system under which employers compel their prospective employees as a condition of employment to waive their rights to litigate future employment-related disputes in a judicial forum (although the term applies as well to employees subjected to such a requirement for the first time during the course of their employment); under Form U-4, as in many other form or standard agreements, future employment-related disputes include, among others, all claims of discrimination that may arise under civil rights or other statutes. By compulsory arbitration, we do not, however, include systems under which employees agree, or otherwise elect, after disputes have arisen to submit them to arbitration. Nor do we include, for pur-

poses of this opinion, agreements in which at the time of hiring employers give prospective employees the choice to opt in advance for arbitration of all future employment-related disputes or for retention of their statutory right to litigate such disputes. In short, we refer to an arbitration agreement as "compulsory" when individuals must sign an agreement waiving their rights to litigate future claims in a judicial forum in order to obtain employment with, or continue to work for, the employer. The question of the enforceability of such agreements ordinarily arises when, during the course of employment, an event then occurs that causes an employee to claim that his rights have been violated, and the employer, relying on the provisions of the waiver, seeks to compel the unwilling employee to arbitrate the claim.[2]

In this case, Duffield argues that she may not be compelled to arbitrate her statutory claims of sexual discrimination and sexual harassment under the waiver mandated by Form U-4.[3] We consider her argument in

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[2]We do not in this opinion consider the enforceability of an arbitration award in instances in which an employee has submitted the dispute to arbitration without challenging the enforceability of the arbitration agreement. *See, e.g., Nghiem v. NEC Electronic*, 25 F.3d 1437 (9th Cir. 1994).

[3]Duffield's sexual discrimination and sexual harassment claims under Title VII appear to be identical to those she brings under the FEHA. Because "[p]aralle! state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme," FEHA claims are arbitrable to the

two steps. First, we describe the historical and statutory evolution of the arbitrability of employment discrimination claims. Second, in light of that background, we evaluate Duffield's specific argument that the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, precludes compulsory arbitration of Title VII claims.

A

The Supreme Court has long recognized that in enacting Title VII Congress envisioned that decisions and remedies from the federal courts would play a unique and indispensable role in advancing the social policy of deterring workplace discrimination on the basis of race, sex, and national origin. *See McKennon v. Nashville Banner-Publishing Co.*, 115 S. Ct. 879, 884-85 (1995) ("[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the [anti-discrimination statutes]"); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (stating that "the federal courts were entrusted with the ultimate enforcement responsibility" under Title VII); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting) (stating that federal courts should not defer to arbitration of Title VII claims "reached by the same combination of forces that had long perpetuated invidious discrimination"); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (stating that federal court relief under

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same extent as Title VII claims. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 n.1 (9th Cir. 1994) (citing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 477 (1982); *Salgado v. Atlantic Richfield*, 823 F.2d 1322, 1326 (9th Cir. 1987)).

Title VII not only compensates victims but vindicates broader public interest in deterring future discrimination); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45, 49-50 (1974) (describing congressional intent to assign "federal courts [the] plenary powers to secure compliance with Title VII"). Most notably, in 1974, the Court unanimously held in *Alexander v. Gardner-Denver* that an arbitration clause contained in a collective bargaining agreement could not bar a plaintiff from seeking Title VII remedies in federal court. "The purpose and procedures of Title VII," the Court explained, "indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral [under any standard of review] to arbitral decisions would be inconsistent with that goal." *Id.* at 56. The Court unanimously reaffirmed this reasoning two years later in *Chandler v. Roudebush*, 425 U.S. 840 (1976), extending *Gardner-Denver* to cover federal employees, and again in 1984 in *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984), stating without qualification that *Gardner-Denver* established that arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory" rights embodied in Title VII.

Prior to 1991, therefore, "[*Gardner-Denver*] was widely interpreted as prohibiting any form of compulsory arbitration of Title VII claims." *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994) (collecting cases). Even as arbitration became increasingly popular in the 1980's, every circuit court to address the issue held firm in refusing to enforce any agreement — in the collective bargaining context or otherwise — that required employees to resolve discrimination claims through binding arbitration. *See, e.g.,*

Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 105-08 (5th Cir. 1990); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 185-87 (1st Cir. 1989); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1305-07 (8th Cir. 1988); *Rosenfeld v. Department of Army*, 769 F.2d 237, 239 (4th Cir. 1985); *EEOC v. Children's Hosp. Medical Ctr.*, 719 F.2d 1426, 1431 (9th Cir. 1983) (en banc) (Fletcher, J., concurring). The circuit courts read *Gardner-Denver* as sending a simple message: Title VII is different. Thus, while the Supreme Court espoused in other contexts a "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), the Eighth Circuit held, in an opinion typical of those issued by the federal courts:

> Although [*Gardner-Denver*] involves a collective bargaining agreement, and not commercial arbitration under the FAA [Federal Arbitration Act, 9 U.S.C. §§ 1-14], this fact should not change the Court's analysis. The [*Gardner-Denver*] Court was well aware that federal policy favors arbitration. That decision turned not on the fact that a collective bargaining agreement was involved, but instead on the unique nature of Title VII claims.
>
> ....
>
> We conclude that in the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII.

Swenson, 858 F.2d at 1306-07; *see also Utley*, 883 F.2d at 187 (holding that in enacting Title VII Congress had "clearly" intended to preclude binding arbitration); *Rosenfeld*, 769 F.2d at 239 (stating that the "plain lesson" of *Gardner-Denver* is that Congress entrusted the final resolution of Title VII claims to the federal courts). As we succinctly put it a few years ago, *Gardner-Denver* simply "precluded Title VII cases from being subjected to compulsory arbitration." *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994).

In 1991, however, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that employees could be required under Form U-4 and NYSE Rule 347 to arbitrate age discrimination claims brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* Without discussing the similarities or differences between the ADEA and Title VII, the Court distinguished *Gardner-Denver* on the ground that it involved a collective bargaining agreement rather than an individual agreement to arbitrate. *See* 500 U.S. at 34-35. The Court reasoned that "[a]lthough all statutory claims may not be appropriate for arbitration," individual agreements to arbitrate such claims should be placed on the same footing as other individual arbitration agreements "unless Congress itself has evinced an intention [discoverable in a statute's text, legislative history, or through an inherent conflict between arbitration and the purpose of the statute] to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 24-26. Finding no such congressional intention evidenced by any inherent conflict between the ADEA's underlying pur-

poses and arbitration, the Court upheld the enforceability of Form U-4 in that circumstance.[4]

The Court's decision in *Gilmer* made it plain that its previous decisions finding arbitration generally inconsistent with the purposes of Title VII are now insufficient to "show[ ] that Congress in enacting Title VII intended to preclude arbitration of claims under the Act." *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 934 (9th Cir. 1992). In the post-*Gilmer* era, if courts are to hold that an act precludes arbitration of claims to which it gives rise, a more concrete showing is required, including a scrupulous examination of Congress' actions and intent. Further, in examining congressional legislation, it is now incumbent upon courts to consider whether Congress intended to preclude every form of arbitration of claims arising under a particular statute, or whether it intended to preclude only certain forms of arbitration agreements.

[1] Almost simultaneously with the Court's issuance of *Gilmer*, Congress enacted the Civil Rights Act of 1991, and, fortuitously, for the first time spoke directly to the arbitration of Title VII claims. While the Act was primarily designed to "overrule" hostile Supreme Court decisions in order to make discrimination claims easier both to bring and to prove in federal courts, and while it increased substantially the procedural rights and remedies

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[4]Gilmer argued only that there was an inherent conflict between the ADEA and arbitration and did not contend that the text or legislative history of the ADEA evinced a congressional intent to preclude arbitration. *See* 500 U.S. at 26.

available to Title VII plaintiffs in federal courts, it also stated that the parties could, "*[w]here appropriate and to the extent authorized by law*," opt to pursue alternative dispute resolution, including arbitration, to resolve their Title VII disputes. Pub.L. 102-166, § 118, *reprinted in* notes to 42 U.S.C. § 1981 (emphasis added).

In the wake of the 1991 Act, we have ruled that claimants who do not "knowingly" agree to arbitrate Title VII claims cannot be required to submit to arbitration. *See Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995). On the other hand, we also held in *Nghiem* that plaintiffs who "voluntarily initiate [ ] binding arbitration" of their Title VII claims are "bound by the arbitrator's decision." 25 F.3d at 1439-40. "Once a claimant submits to the authority of the arbitrator and pursues arbitration," we explained, "he cannot suddenly change his mind and assert lack of authority." *Id.* at 1440. We therefore rejected the argument that simply because the 1991 Act's amendments to Title VII provide for the right to jury trial, that right evinces a congressional intent to allow claimants to escape the binding effect of arbitrations that they initiated. See 25 F.3d at 1441. However, neither in *Nghiem* nor in any other prior case have we ever been required to consider the effect of the 1991 Act on the much more difficult question before us today: the enforceability of compulsory arbitration provisions that, as a condition of employment, compel persons to forego their statutory right to judicial relief with respect to future claims of Title VII discrimination, and to submit all such future claims to binding arbitration.

B

Duffield argues that Congress' intent to preclude the compulsory arbitration of Title VII claims is conclusively demonstrated in the text and/or legislative history of the Civil Rights Act of 1991, as well as by an examination of its purposes. That express congressional intent, Duffield contends, clearly serves to distinguish post-1991 Title VII claims from the pre-1990 ADEA claim that the Supreme Court found arbitrable in *Gilmer*.[5] The EEOC, in a Notice dated July 10, 1997 and in an *amicus* brief filed in this case, has adopted this same position.[6] We agree with

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[5]After the Supreme Court granted certiorari in *Gilmer*, Congress amended the ADEA to provide that *all* waivers of rights under the Act, apparently including the right to a jury trial, 29 U.S.C. § 626(c), must be "knowing and voluntary." *See* Older Workers Benefit Protection Act of 1990, Pub.L. 101-433, 104 Stat. 983 (1990); 29 U.S.C. § 626(f)(1); *Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 841 (1998). A waiver is not considered knowing and voluntary if the individual waives "rights or claims that may arise after the date the waiver is executed." 29 U.S.C. § 626(f)(1)(C). The Supreme Court did not, however, consider this new statutory language in *Gilmer*. Thus, current ADEA claims may require different treatment.

[6]We have never stated what level of deference is due a "notice," as opposed to a guideline or a policy statement, by the EEOC. The Supreme Court has generally advised that "the level of deference afforded will depend on the thoroughness evident in [the EEOC's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it

Duffield and the EEOC and hold that under the Civil Rights Act of 1991 employees may not be required, as a condition of employment, to waive their right to bring future Title VII claims in court.[7]

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power to persuade, if not control." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (internal quotations omitted). The import of the Court's statement seems to be that we should defer to "notices" insofar as they represent reasonable interpretations of Title VII. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) (deferring to EEOC's position on issue that apparently was not formalized in any document outside of the litigation at issue because it represented a reasonable interpretation of Title VII). That is the procedure we have adopted regarding other agency's notices interpreting statutes under their jurisdiction, *see Alexander v. Glickman*, --- F.3d ---, ---, No. 96-17054, 1998 WL 125109, at *3-*4 (9th Cir. Mar.23, 1998), and that is the course we follow here.

[7]Because we hold that the 1991 Act precludes compulsory arbitration, we do not reach Duffield's claims that she did not knowingly agree to arbitrate her Title VII claims and that the NYSE arbitration system fails adequately to protect her statutory rights. While we have spoken previously in *Lai* and *Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997), regarding the 1991 Act's "knowing" requirement, the parties in this case have emphasized the importance of the compulsory arbitration issue *in se*, and have vigorously contested that question throughout this proceeding. Likewise, several amici and the EEOC have urged that we determine the validity of compulsory arbitration provisions as applied to Title VII

As *Gilmer* pointed out, the standard governing the enforceability of arbitration agreements under the FAA is well established. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The burden, therefore, is on Duffield to demonstrate that "Congress intended to preclude a waiver of a judicial forum for [Title VII] claims" in the manner mandated by Form U-4. *Gilmer*, 500 U.S. at 26. "If such an intention exists, it will be discoverable in the text of [the act at issue], its legislative history, or an 'inherent conflict' between arbitration and the [act's] underlying purposes." *Id.* at 26 (emphasis added); *accord Mitsubishi*, 473 U.S. at 628; *see also Block v. Community Nutrition Inst.*, 467 U.S. 340, 344 (1984) ("[A]ll presumptions used in interpreting statutes[ ] may be overcome by specific language or specific legislative history that is a reliable indicator of legislative intent.").

Congress declared as the 1990's dawned that "[n]ow — when more women and minorities are needed in the labor

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claims. Every amici, in fact, has addressed that issue, and we agree that the case is more appropriately resolved on that ground. Lastly, we need not consider Duffield's claim that Form U-4 is a contract of adhesion that is either unconscionable or beyond her reasonable expectations, *see Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652, 1656 (1996); *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 817 (1981), because she makes that argument also only with respect to her Title VII (and FEHA) claims.

market to maintain the health and vitality of our economy — is the time to restore the strength of federal equal employment protection." H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 15-16 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 553-54. It therefore drafted the legislation that became the Civil Rights Act of 1991. The Act had two primary goals: (1) to "restore . . . civil rights laws" by "overruling" a series of 1989 Supreme Court decisions that Congress thought represented an unduly narrow and restrictive reading of Title VII, *see id.* at 30; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994) (listing those decisions), and (2) to "strengthen" Title VII by making it easier to bring and to prove lawsuits, and by increasing the available judicial remedies so that plaintiffs could be fully compensated for injuries resulting from discrimination. Among other things, the 1991 Act provided for the first time a right to damages and to trial by jury and expanded Title VII's fee-shifting provisions. *See* H.R. Rep. No. 40(I) at 30; H.R. Rep. No. 40(II) at 1-4, 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96.

In the context of the Act's significant enlargement of the substantive and procedural rights of victims of employment discrimination, Congress also included what Chief Judge Posner has termed "a polite bow to the popularity of 'alternate dispute resolution.'" *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 294 (1998). Section 118 of the 1991 Act provides that: "Where appropriate *and* to the extent authorized by law, the use of alternative means of dispute resolutions including, . . . arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law

amended by this Title." Pub.L. 102-166, § 118, *reprinted in* notes to 42 U.S.C. § 1981 (emphasis added). Notwithstanding the inclusion of this innocuous-appearing section in a statute providing for a vast strengthening of employees' rights, Robertson Stephens argues that the plain language of the section evinces a congressional intent to allow — indeed, to "encourage" — the use of a process whereby employers condition employment on their prospective employees' agreeing to waive their rights to bring Title VII claims in federal (and state) court. By the time Congress passed the 1991 Act (but after it was drafted and reported out by the House Education and Labor Committee[8]), the argument goes, compulsory arbitration of all employment discrimination claims, including Title VII claims, was "authorized by law" — that is, by *Gilmer* — because the ADEA is similar to Title VII. Therefore, Robertson Stephens contends, compulsory arbitration must be included among the procedures that Congress intended to "encourage" in the 1991 Act.

We are the first circuit court to consider the "plain text" argument that Robertson Stephens makes in the context of an individual agreement that requires as a condition of

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[8]There was no Senate Committee Report, although another House Committee subsequently approved the identical bill without change. *See* H.R.Rep. No. 40(II) at 1, 102d Cong., 1st Sess. 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694 (Judiciary Committee).

employment the arbitration of Title VII claims.[9] District courts have split on the question. *Compare Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, --- F. Supp. ----, No. Civ.A. 96-12267-NG, 1998 WL 81907 (D. Mass. Jan. 26, 1998) (holding that 1991 Act precludes compulsory arbitration of Title VII claims under Form U-4) *with Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1457-58 (D. Minn. 1996) (reaching opposite conclusion despite noting indications to the contrary in the Act's legislative history) *and EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 504 (E.D. Mich. 1997) (holding that compulsory arbitration of Title VII claims, "notwithstanding the legislative history of [the 1991 Act], do[es] not violate federal law or policy"). Two circuits have accepted a version of Robertson Stephens' argument in cases involving significantly different circumstances. Both cases arose under the Americans with Disabilities Act (ADA), which has an arbitration section similar to the 1991 Act's.[10] The first case did not involve either an

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[9]The only other circuit opinions to address the enforceability of individual employment agreements containing prospective waivers of the right to bring Title VII claims in court since the 1991 Act became effective, do not, for various reasons, consider the effect of the Act. *See Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996).

[10]Section 12212 of the ADA, which was passed in 1990, tracks almost verbatim § 118 of the 1991 Civil Rights Act. *See* 42 U.S.C. § 12212. It also has a legislative history

employment agreement or a compulsory waiver, *see Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 148-50 (1st Cir. 1998) (concluding that plain language of the ADA allows enforcement of voluntary, prospective agreement to arbitrate ADA claim against school), and the second, while it involved an employment contract, appears to have involved a voluntary agreement, *see Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215 (5th Cir. 1997) (enforcing arbitration clause to which the employee agreed at a performance review, while holding that the plain text of the ADA refutes the contention that "Congress did not intend for arbitration clauses to prevent individuals from bringing suit for ADA violations"). Those cases are readily distinguishable on their facts. There is a third and more troubling case, however — a case that involves a collective bargaining agreement and that conflicts directly with *Gardner-Denver*. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880-82 (4th Cir.) (holding that employees can be compelled to

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similar to § 118 of the 1991 Civil Rights Act, indicating that Congress intended to codify in the ADA the protections of the Court's holding in *Gardner-Denver*. *See, e.g.*, H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598 ("It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary."); H.R. Rep. No. 101-485(III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499 (explaining that arbitration provision is intended to be consistent with *Gardner-Denver*); *see also infra* at 26-31 (describing the 1991 Act's legislative history). It is also noteworthy that the Court had not yet even decided *Gilmer* when the ADA was enacted.

submit ADA and Title VII claims to binding arbitration pursuant to collective bargaining agreement), *cert. denied*, 117 S. Ct. 432 (1996). In that case, a divided panel of the Fourth Circuit in fact flatly rejected *Gardner-Denver*, which in our view circuit courts are not free to do. *See Agostini v. Felton*, 117 S. Ct. 1997 (reaffirming that circuit courts must always follow directly binding Supreme Court decisions). The Fourth Circuit also ignored the reasoning of eight Justices on the subject of statutory analysis, relied on a separate opinion by Justice Scalia, and partially on the basis of that reasoning decided to disregard the legislative history of the 1991 Civil Rights Act. *See id.* at 882 (quoting *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring)).[11] We respectfully conclude that the Fourth Circuit simply misconstrued the controlling law.[12]

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[11]Interestingly, when the District of Minnesota held that the 1991 Act did not prevent employers from compelling the arbitration of Title VII claims under Form U-4, it used the same approach as the Fourth Circuit — that is, it ignored an opinion signed by eight Justices and relied solely on a lone concurrence by Justice Scalia to disregard the 1991 Act's Committee Reports. *See Johnson*, 940 F. Supp. at 1458 (citing *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring)).

[12]The Supreme Court recently granted certiorari in *Wright v. Universal Maritime Serv. Corp.*, 121 F.3d 702 (4th Cir. 1997) (table), *cert. granted*, 118 S. Ct. 1162 (1998), to consider whether the Fourth Circuit was correct in holding, in line with *Austin* but contrary to seven other circuits, that *Gardner-Denver* is no longer the law. *See* 66

[2] At the outset, we note that Robertson Stephens' construction of § 118 is at odds with Congress' directive to read Title VII broadly so as to best effectuate its remedial purposes. In passing the 1991 Act, Congress explicitly directed courts "that when the statutory terms in [Title VII] are susceptible to alternative interpretations, the courts are to select the construction which most effectively advances the underlying congressional purpose" of the Act. H.R. Rep. No. 40(I) at 88; *accord Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (civil rights statutes should be construed broadly). The purpose of the Act was uniformly to *expand* employees' rights and "to *increase* the possible remedies available to civil rights plaintiffs." *Lai*, 42 F.3d at 1304 (emphasis added). It thus would be "at least a mild paradox," *Pryner*, 109 F.3d at 363, to conclude that in the very Act of which the "primary purpose" was "to strengthen existing protections and remedies available [to employees under Title VII]," H.R. Rep. No. 40(II) at 1, Congress "encouraged" the use of a process whereby employers condition employment on their prospective employees' surrendering their rights to a judicial forum for the resolution of all future claims of race or sex discrimination and force those employees to submit all such claims to compulsory arbitration.[13] It seems far

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U.S.L.W. 3571 (March 3, 1998); *Coleman v. Houston Lighting & Power Co.*, 984 F. Supp. 576, 582 (S.D. Tex. 1997) (listing circuits that disagree with the Fourth Circuit).

[13]It would also be at least a mild paradox to interpret § 118 as encouraging compulsory arbitration, when the sec-

more plausible that Congress meant to encourage *voluntary* agreements to arbitrate — agreements such as those that employers and employees enter into after a dispute has arisen because *both* parties consider arbitration to be a more satisfactory or expeditious method of resolving the disagreement.

Upon a careful reading of § 118 in context, moreover, it is difficult to escape the conclusion that the *text* of the section is, at a minimum, ambiguous — and that, at a maximum, it stands for a proposition that differs significantly from the one advanced by Robertson Stephens. When "examin[ing] the language of the governing statute," we must not be guided by "a single sentence or member of a sentence, but look[ ] to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993) (quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (in turn quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) (other quotation marks and citations omitted))); *see also Bailey v. United States*, 116 S. Ct. 501, 506 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme."). That arbitration is "encouraged" obviously

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tion's other "encouraged" types of alternative dispute resolution — "settlement negotiations, conciliation, facilitation, mediation, factfinding, [and] minitrials" — are all consensual. Section 118; *see Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 698 n.11 (1995) (stating that courts should, if possible, read a string of terms in a statute consistently so that they "reflect[ ] the broad purpose of the Act").

means only that parties are encouraged to arbitrate *within the statutory boundaries Congress contemplated*. Indeed, it would seem entirely disingenuous to fasten onto that one word and conclude that Congress was boundlessly in favor of all forms of arbitration, regardless of the desires or interests of the persons whose rights the Civil Rights Act of 1991 was designed to protect.

[3] The phrase "[w]here appropriate and to the extent authorized by law" is the critical statutory language; it provides the section's substantive limitations. While the phrase, if read out of context, is opaque, in the context of the statute and its "object and policy," *John Hancock*, 510 U.S. at 94-95, it tells us much about what Congress actually intended. For starters, following the Supreme Court, we are "reluctan[t] to treat statutory terms as surplusage." *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 698 (1995); *see also Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 & n.11 (1988) (citing cases holding same). We therefore presume that Congress' qualifiers of "where appropriate" and "to the extent authorized by law," § 118, set forth separate and distinct limitations on the conditions and circumstances under which the arbitration process may be invoked to resolve Title VII claims. *See Bailey*, 116 S. Ct. at 507 ("assum[ing] that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning"). The presence of the limiting phrase "where appropriate" at the very least refutes the argument that "to the extent authorized by law" means that Congress intended either to encourage *all* forms of arbitration or to encourage the use of arbitration under all conditions and circumstances that might otherwise be lawful. Rather, it seems clear that

Congress intended to encourage arbitration only under circumstances or conditions it deemed to be both legally permissible *and* appropriate.

[4] While the words "where appropriate," standing by themselves, give us little clue as to the circumstances under which Congress deemed arbitration to be "appropriate," or, as the dictionary defines the term, "proper, fitting" or "specially suitable," 1 The New Shorter Oxford English Dictionary 103, def'n 1 (4th ed. 1993), we can glean at least a reasonable understanding of Congress' intent from examining the purpose and objective of the 1991 Act, that purpose and objective being to expand employees' rights and remedies under Title VII. "Where appropriate," as used in the Act, would appear to mean where arbitration furthers the purpose and objective of the Act — by affording victims of discrimination an *opportunity* to present their claims in an alternative forum, a forum that *they* find desirable — not by forcing an unwanted forum upon them. *See, e.g., John Hancock*, 510 U.S. 86, 94-95 (1993) (courts should construe statutes guided by the "object and policy" of the whole law); *United States v. Qualls*, ___ F.3d ___, No. 95-50378, 1998 WL 149393, at *2 (9th Cir. Apr. 2, 1998) (en banc) (same).

[5] Likewise, § 118's other qualifier, the phrase "to the extent authorized by law," does not automatically lend itself to a fixed definition. It most likely codifies the "law" as Congress understood it at the time it either drafted or passed the provision. As the Supreme Court has stated, we should "examine initially" the statute "with an eye toward determining *Congress' perception of the law* that it was shaping or reshaping." *Thompson v. Thompson*, 484

U.S. 174, 180, 108 S. Ct. 513, 98 L.Ed.2d 512 (1988) (emphasis added); *see also Brown v. GSA*, 425 U.S. 820, 828, 96 S. Ct. 1961, 48 L.Ed.2d 402 (1976) (applying this principle to congressional amendments to Title VII). The overwhelming weight of the law at the time Congress drafted § 118, and it was reported out of the House Education and Labor Committee, was to the effect that compulsory agreements to arbitrate Title VII claims were unenforceable. In other words, such agreements were *not* "authorized by law." To the contrary, the law at that time prohibited employers from compelling employees to arbitrate Title VII claims pursuant to collective bargaining agreements, "in large part" because of the Court's recognition of the critical role that Congress envisioned for the independent federal judiciary in advancing Title VII's societal goal. *See McDonald*, 466 U.S. at 289; *Gardner-Denver*, 415 U.S. at 56. Although the Supreme Court had adopted in contexts outside of employment discrimination a "liberal federal policy favoring arbitration agreements," *Moses H. Cone*, 460 U.S. at 24, it had done even that only under the explicit assumption that these agreements constituted "freely negotiated choice-of-forum clauses." *Mitsubishi*, 473 U.S. at 628, 631; *see also, e.g., id.* (stating that "nothing . . . prevents a party from excluding statutory claims from the scope of an agreement to arbitrate"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84 (1989) (upholding agreement to arbitrate because it "broadened" plaintiff's right to select a forum for resolving disputes); *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] is a matter of consent, not coercion."). Perhaps most important, as of the time § 118 was drafted

and reported out of the House Education and Labor Committee, the circuit courts, without exception, had "widely interpreted" Title VII as prohibiting "*any form* of compulsory arbitration," including in individual employment cases. *Lai*, 42 F.3d at 1303 (emphasis added); *see also supra* at 8-10 (gathering cases). Certainly when Congress wrote the 1991 Act, it could not have been expected to be better able than the circuit courts to predict the Supreme Court's narrowing of *Gardner-Denver*. *Cf. Thompson*, 484 U.S. at 180 (assuming Congress' view of the law to be the lower courts' consensus where the Supreme Court had not spoken to the contrary).

By the time the 1991 Act was actually passed, the law had become less clear. The Court's decision in *Gilmer* was issued just before the 1991 Act was officially enacted, leaving room for the possible inference that § 118 intended to codify that decision also. Yet even if such an inference might have been permissible under other circumstances, at the time the 1991 Act was enacted it was still at least an open question whether *Gilmer* applied to Title VII claims. The *Gilmer* opinion itself is silent regarding any comparison between Title VII and the ADEA. The ADEA shares many of the substantive provisions of Title VII, but its remedial and procedural provisions were originally modeled after the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, not Title VII. *Lorillard v. Pons*, 434 U.S. 575, 578-84 (1978); *see also McKennon*, 513 U.S. 352, 357 (1995) (noting that even after the ADEA's enforcement was transferred to the EEOC its procedural provisions follow the FLSA and are distinct from those of Title VII). In fact, the Court had held that because of the "crucial" differences between the

procedural provisions in the ADEA and Title VII, any attempt to divine congressional intent in this area by comparing the two statutes "is misplaced." *Lorillard*, 434 U.S. at 584-85. While, in the absence of further guidance from Congress itself, there could be room for doubt over its intent with respect to the effect of the phrase "to the extent authorized by law" on Title VII's procedural rules, when the phrase is read in light of the other qualifying phrase and in light of the objectives and purposes of the 1991 Act it seems far more likely that Congress was referring to the *Gardner-Denver* line of cases than to *Gilmer*.

[6] Any doubt on this point, however, is resolved by even a cursory glance at § 118's legislative history. That history makes it clear that there is no need to hypothesize over whether Congress intended to include *Gilmer* within its definition of what was "authorized by law." It is evident from the legislative history that the answer to that inquiry is a resounding "no." Congress in no way intended to incorporate *Gilmer*'s holding into Title VII, or to authorize compulsory arbitration of Title VII claims. In fact, its clearly expressed intent was precisely the opposite.

The legislative history of § 118 unambiguously confirms that Congress sought to codify the law as it stood at the time the section was *drafted*, and eliminates any possibility that Congress intended to write *Gilmer* into Title VII law or to leave the question of which forms of arbitration were permissible to the whims and presumptions of future court decisions. Specifically, the committee reports and the floor statements describing § 118 — which we have already held in *Lai* demonstrate Congress' intent in passing the 1991 Act, *see* 42 F.3d at 1304-05 — plainly demon-

strate that in allowing arbitration only "[w]here appropriate and to the extent authorized by law" Congress intended to adopt *Gardner-Denver*'s firm rule precluding enforcement of compulsory agreements to arbitrate future Title VII claims, not *Gilmer*'s possible validation of such agreements. In fact, given the possible ambiguity in the literal language of the statutory phrases that relate specifically to arbitration, it is the unusual force and clarity of the statute's legislative history that is ultimately dispositive in this case.

[7] "In surveying legislative history, [the Supreme Court has] repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). This is especially true when, as in this case, the Committee reports were published before Congress' votes on the bill. The House Committee on Education and Labor, in its report on H.R. 1, the bill that became the Civil Rights Act of 1991, "explained that the purpose of [§ 118] was to *increase* the possible remedies available to civil rights plaintiffs." *Lai*, 42 F.3d at 1304. The Committee report states:

> The Committee emphasizes . . . that the use of alternative dispute mechanisms is . . . intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the committee believes that any agreement to submit disputed issues to arbitration, whether in the context of

> collective bargaining or in an employment contract, *does not preclude the affected person from seeking relief under the enforcement provisions of Title VII*. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L.Ed.2d 147 (1974). The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.

H.R. Rep. No. 40(I) at 97 (emphasis added), *quoted in Lai*, 42 F.3d at 1304. The Committee's explanation of § 118 echoed exactly the Conference Report's description of the same (verbatim) section in the Civil Rights Act of 1990, which President Bush vetoed for other reasons. In that report, the Conference Committee explained that "any agreement to submit disputed issues to arbitration . . ., in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. Conf. Rep. No. 755, 101st Cong., 2d Sess. 26 (1990). These statements make it clear that even though *Gardner-Denver*'s literal holding applied only to collective bargaining agreements, Congress intended that the decision's rule against compulsory arbitration of Title VII claims be applicable to all "employment contract[s]." In other words, Congress concluded that all such mandatory agreements as conditions of employment were, at the very least, "inappropriate," and thus unenforceable.

[8] Lest there be any doubt as to the intended meaning of the Act's arbitration provision, Congress in fact *specifically rejected* a proposal that would have allowed

employers to enforce "compulsory arbitration" agreements. It did so in the most emphatic terms, explaining that:

> H.R. 1 includes a provision encouraging the use of alternative means of dispute resolution to supplement, rather than supplant, the rights and remedies provided by Title VII. The Republican substitute, however, encourages the use of such mechanisms "in place of judicial resolution." Thus, *under the latter proposal employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints*. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, *rather than being forced into compulsory arbitration*, to resolve important statutory and constitutional rights, including equal opportunity rights. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonald v. City of West Branch*, 466 U.S. 284 (1984). American workers should not be forced to choose between their jobs and their civil rights.

H.R. Rep. No. 40(I) at 104 (emphasis added). This rejection of the "Republican" proposal provides still further "strong evidence" of Congress' intent, *Thompson*, 484 U.S. at 185, to preclude compulsory arbitration of civil rights claims and to "encourage" only voluntary agreements — agreements that do not require potential employees to waive their right to litigate in a judicial forum as a mandatory condition of employment. This part of the Committee report also eliminates any possibility that § 118 was in any way a product of legislative compromise

that was not meant to advance the overall purposes of the Act.

That *Gilmer* turned out to undermine some of Congress' preferred Supreme Court decisions, of course, in no way alters Congress' expressed intent, in drafting § 118, to codify its position that "compulsory arbitration" of Title VII claims was not "authorized by law," and that compelling employees to forego their rights to litigate future Title VII claims as a condition of employment was not "appropriate." Indeed, Congress' reading of *Gardner-Denver* and *McDonald* was — as the Court remarked regarding Congress' understanding of a different facet of Title VII law that it amended -

> entirely reasonable. Whether [Congress'] understanding [of the law] was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act. . . . For the relevant inquiry is not whether Congress correctly perceived the state of the law, but rather what its perception of the law was.

Brown, 425 U.S. at 828 (footnote omitted); *see also Blanchard v. Bergeron*, 489 U.S. 87, 91-93 (1989) (holding that Congress codified the holdings of three cases when a Committee report cited those cases and said that they "correctly applied" its view of the law). And, as we have said many times before, so long as there is no constitutional infirmity, Congress' intended meaning of terms reigns supreme in the statutory arena. *See, e.g., Arriaga-Barrientos v. INS*, 937 F.2d 411, 414-15 (9th Cir. 1991) (holding that even if courts are "sympathetic" to a

policy argument contrary to a statute's requirements, "we lack the legitimate authority to undermine legitimate congressional will"). When Congress codifies the policy of certain of the courts' holdings, we are bound to follow the dictates of those cases regardless of whether we think they were correctly decided, and regardless of whether they are subsequently limited or overruled.

The Committee's view of § 118 was reiterated by key congressmen in the floor debates, who repeatedly stated that § 118 encouraged arbitration only "where parties knowingly and voluntarily elect to use those methods." 137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole); *see also* 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde) (explaining that § 118 encourages arbitration where "the parties knowingly and voluntarily elect" to submit to such procedures). The most informed and important statements were made by Representative Edwards, the Chairman of the House Committee on Education and Labor. Representative Edwards unequivocally explained during the debate immediately prior to the Act's passage that the provision was "intended to be consistent with . . . *Gardner-Denver*." 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards). The Chairman added, so as to make the point perfectly clear:

> *This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court's*

> *recent decision in Gilmer . . ., or any application or extension of it to Title VII.*

Id. (emphasis added).[14] Finally, President Bush echoed Congress' understanding of the arbitration section in signing the Act, stating that "section 118 encourages *voluntary* agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration." Statement of the President of the United States, Signing Ceremony, Pub.L. No. 102-166 (Nov. 21, 1991), *reprinted in* 1991 U.S.C.C.A.N. 768, 769 (emphasis added). No statements were made in reports, on the floor, or by the President that contradicted this basic understanding.[15]

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[14]In view of Congress' repeated and unyielding pronouncements in the legislative histories of the ADA and the Civil Rights Act of 1991 that it sought to codify the Court's decision in *Gardner-Denver*, not *Gilmer*, we have some difficulty in understanding the Fourth Circuit's conclusion, after quickly discussing the Acts' legislative histories, that it "[does] not think that Congress intended to return to [*Gardner-Denver*]." *Austin*, 78 F.3d at 882. That conclusion is contrary to the import of every statement congressional committees and members of Congress made during the Acts' legislative processes and overlooks the fact that *Gilmer* was not even decided when the ADA was enacted.

[15]In fact, that Congress declined to allow agreements to arbitrate Title VII claims as a condition of employment is made even more clear by the dissenting views on the bill expressed in the Committee minority report (authored by Rep. Hyde). In discussing the arbitration provision, the

Robertson Stephens' principal response to the force of the Act's legislative history is that we should disregard entirely the evidence of Congress' intent and hold instead that, even though Congress did not *intend* to adopt *Gilmer*, the language of § 118 must be read as doing so.[16] Under Robertson Stephens' reading of § 118, the phrase "to the extent authorized by law" would be simply an elastic phrase, not expressly adopting or rejecting any Supreme Court case, but expanding and contracting with the ebb and flow of court decisions. Thus, Robertson Stephens would have us conclude that although § 118 was intended by its drafters, and understood by both the

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dissent lamented that, because § 118 encouraged only "voluntary" agreements, it was "nothing more than an empty promise" to those who wished to encourage arbitration of more Title VII claims. H.R. Rep. No. 40(II) at 78. If the arbitration provision had been thought to allow *ex ante* waivers as a condition of employment, there would have been absolutely no basis for the dissent's vigorous complaints.

[16]Robertson Stephens' other response to the legislative history is that even if it demonstrates that Congress intended to allow the enforcement only of "voluntary" agreements to arbitrate Title VII claims, Duffield's decision to sign Form U-4 was purely voluntary as that term is commonly understood. Whatever the merit of this dubious assertion, it is irrelevant here because our task is not to divine a literal meaning of the word "voluntary." Rather, it is to discover congressional intent. And, as we have explained in the text, Congress' intent was to preclude the enforceability of arbitration agreements imposed as a condition of employment.

Democratic and Republican members of both Committees that considered the bill, to preclude compulsory arbitration of Title VII claims — an intention unequivocally reiterated throughout the floor debates — the section, without a single word being changed, nevertheless was instantaneously transmogrified, and took on exactly the opposite meaning, on the day the Court's decision in *Gilmer* was announced. Any such "through the looking glass" construction would entail a gross perversion of the legislative process.

In essence, confronted with the legislative history, Robertson Stephens retreats to its "plain meaning" theory, urging us to construe the words "to the extent authorized by law" as encouraging the use of all lawful forms of arbitration at all times and under all circumstances. But "the meaning of statutory language, plain or not, depends on context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). And, as we explained previously, the phrase's actual meaning, when viewed in the context of the remainder of the Act, is at the least ambiguous, and at the most quite different from that which Robertson Stephens urges. Robertson Stephens' argument ignores not only the purposes and objectives of the 1991 Act, but also the fact that the statute contains an express limitation in addition to the phrase "to the extent authorized by law" – the limitation "where appropriate" — which must be read along with it. Thus, even if an elastic interpretation of "to the extent authorized by law" would otherwise be reasonable, Robertson Stephens' construction would deprive the phrase "where appropriate" of any content whatsoever. If we are to give those additional words of limitation mean-

ing, as the Supreme Court tells us we must, *see, e.g., Bailey*, 116 S. Ct. at 507; *Babbitt*, 515 U.S. at 698, they must be construed as incorporating Congress' purposes and objectives as expressed in the 1991 Act, *see, e.g., John Hancock*, 510 U.S. at 94-95 (collecting cases holding that courts must interpret terms of statute consistent with the act's "object and policy") — namely, as increasing the rights and remedies afforded to victims of discrimination.

In the end, what is perhaps the most compelling reason for rejecting Robertson Stephens' argument is the specific instruction in *Gilmer* and several preceding arbitration cases to look to the statute's terms and to *"its legislative history,"* as well as its underlying purpose, in determining whether Congress "evinced an intention to preclude a waiver of judicial remedies" in the particular circumstances. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628) (emphasis added); *accord Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987). Whatever role we should generally assign to legislative history, our duty when we try to discern whether Congress intended to preclude a waiver of a judicial forum with respect to claims arising under a particular statute is clear. Such an intent, the Court has expressly and repeatedly held, may be discerned in the text of the relevant act *or* in its legislative history, as well as in any inherent conflict between the statutory purposes and arbitration. *Id.* Not a single word in the 1991 Act's legislative history suggests that Congress intended to make the validity of requiring the arbitration of Title VII claims dependent on future court decisions. To the contrary, the legislative history of the Act makes it absolutely clear that Congress intended § 118 to codify the *Gardner-Denver* approach to compul-

sory arbitration agreements and to preclude the enforceability of such agreements with respect to Title VII claims. Congress "perce[ived] the state of the law," *Brown*, 425 U.S. at 828, as forbidding such agreements and, at the very least, viewed them as wholly "[in]appropriate." It specifically rejected a proposal that would have allowed them to be enforced. It thought, mistakenly or not, that the use of compulsory arbitration provisions would, in the House Committee's resounding and unequivocal words, "force[ ] American workers to choose between their jobs and their civil rights." H.R. Rep. No. 40(I) at 104. To force such a choice was certainly not the purpose or intent of Congress in passing the Civil Rights Act of 1991.[17]

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[17]We recognize that an argument can be made that by its preference for *Gardner-Denver*, Congress intended only to preclude the use of adverse arbitration awards as a bar to the prosecution of Title VII actions. We conclude, however, for the reasons set forth in the text, that Congress did not wish to force victims of discrimination to submit to compulsory arbitration if they preferred to assert their Title VII claims directly in a judicial forum. To the contrary, we believe it clear that Congress intended that Title VII claimants have the right to go straight to court. *See Pryner*, 107 F.3d at 364-65; *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 946 (1997). Moreover, in this circuit we are precluded from adopting such a construction by *Nghiem*, in which we held that a Title VII claimant who voluntarily initiates arbitration proceedings is bound by an unfavorable award and may not thereafter seek to litigate his claim. *See* 25 F.3d at 1439-41.

[9] In view of the fact that "the context, language, and [legislative] history of" the 1991 Act "together make out a conclusive case," *Thompson*, 484 U.S. at 187, that Congress intended to preclude compulsory arbitration of Title VII claims, we think it inescapable that Form U-4 is unenforceable as applied to such claims. Form U-4 compels precisely what Congress intended to prohibit in the 1991 Act: mandatory requirements under which prospective employees agree as a condition of employment to surrender their rights to litigate future Title VII claims in a judicial forum and accept arbitration instead. Because every employer in the securities industry requires its employees to sign Form U-4, the form is especially violative of Congress' limitations. Form U-4 is a take-it-or-leave-it offer for anyone wishing to work anywhere in the United States as a broker-dealer in that industry. It forces individuals like Duffield to opt for one of two "choices": sign Form U-4 or seek another profession. This sort of dilemma is fundamentally at odds with a provision of the Civil Rights Act of 1991, § 118, that was intended to help deter employment discrimination by *increasing* claimants' choice of fora. *Cf. Bercovitch*, 133 F.3d at 150 (enforcing arbitration agreement between parents and school as applied to ADA claim because it was purely "voluntary," but suggesting that "involuntary" agreements, or agreements that individuals had no "influence over," would be unenforceable).

[10] In holding that Form U-4 is unenforceable as applied to Title VII claims, we do not, of course, mean to suggest that Congress sought in the 1991 Act to preclude employees from agreeing *after a claim has arisen* to submit

the dispute to arbitration.[18] Indeed, employees in many instances may believe that arbitration is preferable to protracted and expensive litigation and will willingly make that choice. Because of the legal community's recently increased faith in arbitration, those plaintiffs are now "encouraged" to resolve their employment disputes in that manner, and if they choose to do so, they are bound by the arbitrator's decision. *See Nghiem*, 25 F.3d at 1440. The contract before us, however, requires compulsory arbitration in every sense of the word, and it is contracts of that nature we are compelled to hold unenforceable under the Civil Rights Act of 1991.

We recognize that, as the Supreme Court has stated, agreements to arbitrate must generally be treated not as "forego[ing] the substantive rights afforded by [a] statute," but rather as merely changing the forum in which they are protected. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). Yet even assuming that the general federal policy in favor of arbitration would ordinarily apply to the compulsory arbitration of civil rights claims, we are not free to apply that policy here. Where Congress has manifested its intent, with regard to arbitration questions and otherwise, the Supreme Court has made it abundantly clear that the judiciary is not free to "legislate" its own contrary preferences. *See, e.g., Brogan v. United States*, 118

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[18]Furthermore, as we noted earlier, we express no view on the alternative procedure suggested in the proposed NASD rule change whereby individuals would be given the option at the time of employment to choose arbitration or litigation as the method of resolving future discrimination claims. *See supra* at 6 & n.1.

S. Ct. 805, 811-12 (1998) (stating that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so"); *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) ("[A court's] task is to give effect to the will of Congress [when] its will has been expressed in reasonably plain terms."); *Gilmer*, 500 U.S. at 26 (directing courts to follow congressional intent in arbitration context); *Rodriguez de Quijas*, 490 U.S. at 483-84 (same). Whether or not permitting compulsory arbitration of Title VII claims is "more desirable than" the ban that Congress has imposed on such practice, "the proper venue for resolving that issue remains on the floor of Congress." *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 964 (1998). For now, at least, Congress has resolved the question in favor of preserving the right of victims of employment discrimination to seek their remedy in the federal courts.

III

Duffield also argues that she cannot be required to arbitrate her claims because the arbitration agreement imposes an unconstitutional condition of employment. This argument, unlike the one we have just considered, is applicable to her state tort and contract claims as well as to her claims that her civil rights have been violated. The argument is, in essence, that Form U-4 requires Duffield to forfeit her Fifth Amendment right to due process, her Seventh Amendment right to a jury trial, and her right to an Article III judicial forum. While this argument was not raised or addressed by the Court in *Gilmer*, it would, if meritorious, render Form U-4 unenforceable as applied to all of Duffield's underlying claims for relief. The district

court found it unmeritorious, holding that the essential prerequisite of state action was lacking. We agree.

[11] A threshold requirement of any constitutional claim is the presence of state action. This requirement, however, does not restrict the application of the Constitution solely to governmental entities. Private entities like the NYSE and the NASD may be held to constitutional standards if their actions are "fairly attributable" to the state. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982). The Supreme Court has established three criteria for satisfying this standard:

> First, [t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State. . . . The complaining party must also show that there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action may fairly be treated as that of the State itself. The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.
> . . .
>
> Second, . . . a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State. Mere approval or acquiescence in the initiatives or a private party is not sufficient to justify

> holding the State responsible for those initiatives.
>
> . . .
>
> Third, the required nexus may be present if the private party has exercised powers that are traditionally the exclusive prerogative of the State.

Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982) (internal quotations and citations omitted). Duffield asserts that state action is independently present under each test. We do not agree.

A

Duffield's first argument is that state action is present because "federal law requires all broker-dealers to register with a national securities exchange (i.e., the NYSE or NASD), and to abide by the rules of that exchange — including its mandatory arbitration rules — as a condition of their continued employment." Appellant's Brief at 43. Robertson Stephens counters this argument by pointing out that federal law did not require broker-dealers to register with a national securities exchange until 1993, five years after Duffield signed her Form U-4. Therefore, it asserts, no federal law "required" Duffield to sign the form in 1988. Robertson Stephens is correct.

[12] The rules of NASD and the NYSE are not fairly attributable to the government unless they carry the force of federal law. And prior to 1993, no federal statute or regulation required Duffield to register with the securities exchanges, much less to sign Form U-4 or to arbitrate employment disputes. *See Association of Inv. Brokers v. SEC*, 676 F.2d 857, 861-62 (D.C. Cir. 1982). Thus, when Duffield signed her Form U-4 in 1988 and thereby waived

her rights to litigate employment-related disputes in a judicial forum, she did not do so because of any state action.[19]

[13] In 1993, however, the Securities and Exchange Commission (SEC) adopted a regulation that required all broker-dealers to be registered with at least one of the securities organizations of which Duffield's firm was a member — i.e., the NASD and the NYSE — before effecting any securities transaction. *See* 17 C.F.R. § 240.15b7-1 (adopted May 11, 1993). That registration regulation, like the SEC's registration regulation at issue in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1351 (1996), "operates not as a private compact among brokers and dealers but as federal law." *Id.* at 941. Hence, to borrow *Blount*'s reasoning, as a government-mandated "condition to any participation in a . . . securities career," the current requirement that new employees register with a national securities exchange "constitutes government action of the purest sort." *Id.*

[14] Duffield attempts to take advantage of this new regulation by arguing that its registration requirement was

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[19]Duffield's attempt to skirt this fact by asserting that prior to 1993 she was required by NYSE Rule 345(a) to register with an exchange and that federal law obligated each exchange to enforce its own rules, see 15 U.S.C. § 78(g)(1), is unavailing. That a NYSE rule, rather than any federal mandate, required Duffield to register with the exchange, removes the government's "responsibility" for the imposition of the arbitration requirement. *See Blum*, 457 U.S. at 1004.

a governmentally imposed condition of her *continuing* employment and that Robertson Stephens did not invoke the arbitration clause until 1995 when it moved to compel arbitration. State action can be present, however, only to the extent that there is "a sufficiently close nexus between the State and the *challenged action*," *Jackson v. Edison Co.*, 419 U.S. 345, 351 (1974) (emphasis added); the action that Duffield challenges in her constitutional claims is the requirement that she waive her right to litigate employment-related disputes. Since agreements to arbitrate are "valid, *irrevocable*, and enforceable," 9 U.S.C. § 2 (emphasis added), to the same extent as any other contract, see *Gilmer*, 500 U.S. at 24, it is immaterial that years after Duffield signed her Form U-4 containing the arbitration provision, federal law required other employees like her to register with securities exchanges or even that it compelled her to remain registered. No federal law required Duffield to waive her right to litigate employment-related disputes by signing the Form U-4 in 1988, and no state action is present in simply enforcing that agreement. Insofar as Duffield argues that the "challenged action" is the requirement that she actually arbitrate her lawsuit, that requirement is found in her private contract, not in federal law.[20]

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[20]As described *supra* in note 1, the NASD recently has voted to abolish its mandatory arbitration requirement with regard to employment discrimination claims. If the SEC refuses to approve this change for some reason, then state action might be present, because the government would be exercising at the least "significant encouragement" over the private entity's actions. *Blum*, 457 U.S. at

B

[15] Duffield next argues that because the NYSE and NASD are required to obtain SEC approval before their rules may go into effect, *see* 15 U.S.C. §§ 78f(a), (b), 78o-3(a), (b), and because the SEC has exercised influence over such rules, the government may fairly be said to be encouraging the mandatory arbitration requirement. We previously have recognized that

> the [SEC] has virtually plenary authority over the arbitration procedures adopted by the national securities exchanges and securities associations. *See Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2341 (1987). This authority includes the power to "abrogate, add to, and delete from" the arbitration rules adopted by such bodies if necessary or appropriate to protect rights created by the Securities Acts. *Id.*; 15 U.S.C. § 78s(c) (1982).

Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 286 (9th Cir. 1988). We conclude here, however, that the SEC has not exercised sufficient influence over the compulsory arbitration requirement in Form U-4, the NASD procedures, or NYSE rules to deem that requirement the choice of the state.

The touchstone of state action in the context of governmental oversight is whether the government has moved

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1004-05. To date, however, the SEC has only acquiesced to NASD's and NYSE's mandatory arbitration rules. *See infra* section III.B.

beyond mere approval of private action into the realm of "encouragement, endorsement, and participation" of that action. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615-16 (1989); *see also Blum*, 457 U.S. at 1004 (stating that state action is present when "the government has provided such significant encouragement, either overt or covert, that the [private party's] choice must be deemed that of the State"). The SEC has thus far failed to cross that line with regard to the NASD's and NYSE's compulsory arbitration requirements. "To begin with the obvious, there is nothing in the [Securities Exchange Act of 1934] and there is no Commission rule or regulation that specifies arbitration as the favored means of resolving employer-employee disputes." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 135-36 (1973). No SEC rule or action that has been called to our attention encourages the NASD or the NYSE to compel arbitration. This puts the role of the SEC in a critically different light than that of the Federal Railroad Administration in *Skinner*, which drafted regulations making plain its "strong preference for [drug] testing," explicitly conferred on railroads the authority to conduct such tests, required railroads and employees to perform such tests, and codified its right to receive certain biological samples. *See* 498 U.S. at 615.

[17] The SEC's role to date of approving the exchanges' rules and conducting oversight of their procedures has been no more aggressive than that of the Public Utilities Commission in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In that case, a private utility was required by the state's regulatory scheme to obtain approval of its business practices from the utility commission. When

those practices were challenged, the Court declined to find state action, reasoning that "where the commission has not put its weight on the side of the proposed practice by ordering it, . . . [its] failure to overturn this practice" does not make its action "state action" for purposes of constitutional inquiries. *Id.* at 357. Duffield has pointed to numerous instances of the SEC's oversight and development of the exchanges' arbitration rules and procedures, but she has failed to put forth any example of governmental encouragement or endorsement of the compulsory arbitration requirement itself. Thus, the SEC's involvement is insufficient under *Skinner*, *Blum*, and *Jackson* to render the industry's overall requirement that its employees submit to arbitration in lieu of court proceedings fairly attributable to the state.

C

[18] Duffield's last argument is that the NASD and NYSE are invoking governmental authority because through their arbitration system they are "perform[ing] the government function of enforcing and adjudicating Title VII." Appellant's Brief at 53. This argument is contrary to the established law of this circuit. We have long held that, since dispute resolution is not an "exclusive" governmental function, neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action. *See, e.g., FDIC v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987). The 1991 Civil Rights Act's allowance of voluntary, private arbitration agreements forecloses the assertion that civil rights statutes should be exempted from this general rule.

IV

Duffield has met her burden of showing that Congress intended in enacting the Civil Rights Act of 1991 to preclude the compulsory arbitration of Title VII disputes. Form U-4 is, therefore, unenforceable with respect to her Title VII and FEHA claims. Because no state action was involved in Duffield's mandatory waiver, however, there is no constitutional bar to enforcing Form U-4 with respect to her state tort and contract claims. Accordingly, the district court's order compelling arbitration is AFFIRMED IN PART and REVERSED IN PART. The district court's denial of Duffield's motion for summary judgment on her declaratory relief claim is AFFIRMED IN PART and REVERSED IN PART. The case is REMANDED for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

APPENDIX B

[Stamped:
FILED
AUG 26 1996
RICHARD W. WIEKING, CLERK]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TONJYA DUFFIELD, Plaintiff, vs. ROBERTSON, STEPHENS & COMPANY, a partnership; and ROBERTSON, STEPHENS & COMPANY, a corporation, Defendants.	No. C-95-109 EFL ORDER VACATING AND MODIFYING ORDER OF AUGUST 6, 1996

On August 16, 1996, plaintiff filed an expedited motion for leave to file a motion for correction and reconsideration of the August 6, 1996 order denying plaintiff's motion for summary judgment and denying certification under 28 U.S.C. § 1292(b). This motion raises the following two issues: (1) the August 6, 1996 order mistakenly included language which appears to decide an issue which was not present before the Court, namely, whether plaintiff "knowingly" entered into the agreement to arbitrate under Prudential Insurance Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994); and (2) whether the denial of 28 U.S.C. § 1292(b) certification should be reconsidered.

After having considered all of papers filed regarding the August 16, 1996 expedited motion, the Court finds that the August 6, 1996 order does inadvertently contain some language which appears to decide the "knowingly" issue. Accordingly, the Court hereby ORDERS that the August 6, 1996 order is VACATED and MODIFIED by the present order.

And as for the 28 U.S.C. § 1292(b) certification issue, the only new argument presented is that it would be inefficient to litigate the "knowingly" issue. The Court is not persuaded. Moreover, defendants are of the opinion that, "the 'knowingness' issue can be resolved on undisputed facts." Defendants' response filed August 21, 1996 at 2. Accordingly, the logical next step would be for the defendants to move for summary judgment on the "knowingly" issue. Defendants should either file this motion or set up a status conference with this Court within 30 days of the date of this order. For these reasons, the Court hereby ORDERS that plaintiff's expedited motion for leave to file motion for correction and reconsideration is DENIED.

I. INTRODUCTION

Plaintiff, a securities broker-dealer formerly employed by defendant Robertson, Stephens & Company ("defendant"), filed this complaint on January 11, 1995 claiming Title VII and FEHA sexual discrimination and sexual harassment, breach of contract, deceit, intentional infliction of emotional distress, and negligent infliction of emotional distress. As a threshold matter, the issue of whether plaintiff is bound to pursue these claims in arbitration must be decided. After extensive discovery, plaintiff has moved for partial summary judgment regarding her claim for declaratory relief which seeks to have the arbitration clause declared unenforceable. After having considered all of the pleadings and papers filed in regards to this motion, as well as the oral arguments presented by counsel at the June 6, 1996 hearing, the Court denies plaintiff's motion for partial summary judgment.

II. BACKGROUND

Plaintiff was employed by defendant as a securities broker-dealer from June 1988 to April 1994. Defendant is a member of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), both of which are private corporations. As a condition of her employment, defendant required plaintiff to register with a national securities exchange by signing a Uniform Application for Securities Industry Registration or Transfer, which is commonly known as a Form U-4. On June 20, 1988, plaintiff did in fact complete and sign a Form U-4 which contained the following arbitration clause:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required

> to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

Declaration of Michael Rubin, Exh. G at 4.

The NYSE requires its member organizations and their employees to arbitrate their disputes at the request of either party to the dispute.[1] Although NASD also requires the employment disputes of its members to be submitted to arbitration, the briefs have focused on the NYSE Rules, and therefore so will this Order. See Defendant's Request for Judicial Notice, Exh C. On March 1, 1996, plaintiff stipulated for purposes of this motion only that she knew that "by executing a Form U-4 upon commencement of her employment with defendant . . . she would be required to arbitrate claims such as the ones she asserts in the present action." Stipulation and Order filed March 1, 1996 at 1.

The present motion is based on plaintiff's argument that the arbitration requirement is unenforceable because it (1) imposes an unconstitutional condition on her employ-

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[1] NYSE Rule 347 states:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

Defendant's Request for Judicial Notice, Exh. B.

ment, (2) does not adequately protect her rights under Title VII, and (3) was not entered into knowingly and voluntarily. Because the Court only took the first argument under submission, the second and third arguments will only be discussed briefly. Transcript of June 6, 1996 Proceedings filed July 2, 1996 at 17.

III. DISCUSSION

A. UNCONSTITUTIONAL CONDITION

1. STATE ACTION

It is fundamental and undisputed that the United States Constitution usually limits only the actions of the federal and state government, and not the actions of private entities. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619-20 (1991). As the Ninth Circuit recently noted:

> While we sometimes treat acts of private parties as public, we do so sparingly. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." Lugar v. Edmonson Oil Co., 457 U.S. 922, 936 (1982).

Mathias v. Pacific Gas and Electric Co., 75 F.3d 498, 501 (9th Cir. 1996). In the simplest terms, the state action requirement is a test used to determine when private entities should be held to constitutional standards. Due to the fact that defendant, as well as the NYSE and the NASD, are private entities, plaintiff is forced to argue that state action is present in this case. However, the Court is not persuaded.

Although the United States Supreme Court has employed various formulations of the state action requirement over the years, the basic principal remains clear and

unchanged.[2] In Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982), the Supreme Court clearly and thoroughly set forth the state action requirement:

> First, . . . "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of latter may fairly be treated as that of the State itself." . . .
>
> Second, . . . a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a

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[2] Justice O'Connor recently observed that:

> [W]e have variously characterized the inquiry as whether "there is a sufficiently close nexus between the State and the challenged action," Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); whether the state, by encouraging the challenged conduct, could be thought "responsible for those actions," Blum v. Yaretsky, 457 U.S. 991, 1005 (1982); and whether "the alleged infringement of federal rights [is] 'fairly attributable to the State,'" Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 979 (1995) (O'Connor, J., Dissenting) (emphasis in original).

> private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.
>
> Third, the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State."

Id. at 1004-05 (citations omitted).

In the present case, plaintiff asserts that state action exists because (1) federal statutory and regulatory law required the plaintiff to register with a securities exchange (e.g., NYSE) and agree to its mandatory arbitration clause and (2) the Securities and Exchange Commission ("SEC") plays a substantial role in developing, reviewing, and approving the securities exchanges' (e.g., NYSE) rules.[3]

a.REQUIREMENTS OF FEDERAL LAW

Quite simply, the first argument is based on a false premise. In 1988 when plaintiff agreed to the arbitration clause, there was absolutely no federal statute or regulation which required her to register with an exchange.

Plaintiff attempts to rely on 15 U.S.C. § 78o(b)(8) which states:

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[3] In footnote 12 of her opening brief, plaintiff also asserts two secondary grounds for a finding of state action; (1) the public function doctrine and (2) Cohen v. Cowles Media Co., 501 U.S. 663 (1991). Plaintiff's Motion for Partial Summary Judgment filed November 2, 1995 at 10-11 n. 12. Although these arguments were presently in cursory fashion, the Court has considered them. The Court hereby finds neither of these arguments sufficient to establish state action in the present case.

> It shall be unlawful for any registered broker or dealer to effect any transaction in . . . any security . . . unless such broker or dealer is a member of a securities association registered pursuant to section 78o-3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member.

But as defendant points out and plaintiff effectively concedes in its reply brief, 15 U.S.C. § 78o(b)(8) applies only to broker-dealer firms and individuals who are not associated with a firm. In addition, 15 U.S.C. § 78o(a)(1) clearly indicates that only broker-dealer firms and individual broker-dealers who are not associated with a firm are required to register.[4] Because plaintiff was associated with a registered broker-dealer firm (i.e., the defendant), 15 U.S.C. § 78o(b)(8) does not apply to him. See Roth v. Securities and Exchange Commission, 22 F.3d 1108, 1109 (D.C. Cir. 1994).

Although 17 C.F.R. § 240.15b7-1 (enacted May 11, 1993) does currently require that individual broker-dealers register with the securities exchanges of which their firms are members, this Securities and Exchange Commission

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[4] 15 U.S.C. § 78o(a)(1) states:

> It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person . . . to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in . . . any security . . . unless such broker or dealer is registered in accordance with subsection (b) of this section.

Rule was not in effect at the time plaintiff agreed to the arbitration clause in the Form U-4 as a condition of her employment with defendant. Plaintiff complains that the arbitration clause was an unconstitutional condition of her employment. Accordingly, the state action analysis must focus on 1988, the year in which plaintiff agreed to the arbitration clause at issue. And in 1988, there was absolutely no federal statute or regulation which required her to agree to mandatory arbitration. Moreover, federal law did not even require her to register with a securities exchange.

And finally, the Court will address two cases, R.J. O'Brien & Assoc., Inc. v. Pipkin, 64 F.3d 257 (7th Cir. 1995) and Blount v. Securities and Exchange Commission, 61 F.3d 938 (D.C. Cir. 1995), on which the plaintiff relied heavily at oral argument.[5] Both of these cases are easily distinguishable.

In R.J. O'Brien, the Seventh Circuit addressed, but rejected a constitutional challenge to the arbitration procedures of the National Futures Association ("NFA"). The NFA is a private corporation registered under the Commodity Exchange Act, 7 U.S.C. §§ 1-25, which has been delegated the registration function by the Commodity Futures Trading Commission ("CFTC"), which is an independent government agency created by Congress. The R.J. O'Brien court did not even undertake a traditional state action analysis, because the NFA was held to be a "government actor in performing the registration function." R.J. O'Brien, 64 F.3d at 262. In addition,

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[5] In spite of their emphasis at oral argument, plaintiff's only discussion of R.J. O'Brien and Blount in the written briefs consists of a single sentence on page 3 of their May 28, 1996 reply brief.

participants in the commodity futures industry are required by federal statute to register with the NFA. 7 U.S.C. §§ 6f(a), 6k(1). The present case must be distinguished because the NYSE is not a government actor and plaintiff was not required by federal law to register.

Similarly, the present case must also be distinguished from Blount, 61 F.3d 938. In Blount, the District of Columbia Circuit considered, but rejected a constitutional challenge to a Municipal Securities Rulemaking Board ("MSRB") rule which limited the political contributions of municipal securities broker-dealers. Instead of deciding whether the MSRB was a private organization or not, the Blount court focused on 15 U.S.C. § 78o-4(a)(1) which requires broker-dealers in municipal securities to register. Id. at 941. Once again, the present case must be distinguished because at the time plaintiff registered, she was not required to do so by federal law.

b. ROLE OF SEC

Plaintiff's second argument regarding state action relies on the role of the SEC in developing, reviewing, and approving the rules of securities exchanges, such as the NYSE arbitration clause. In other words, plaintiff asserts that the SEC "has provided such significant encouragement, either overt or covert, that the choice [of the NYSE to require arbitration] must in law be deemed to be that of the State." Blum v. Yaretsky, 457 U.S. at 1004.

Plaintiff relies on various statutes which set forth the SEC's role regarding the rules of the securities exchanges. 15 U.S.C. § 78s(b)(1) requires all securities exchanges to submit proposed rules and proposed rule changes with the SEC. Unless the proposal merely formalizes an established policy or solely concerns the administration of the exchange, it will not take effect until it is affirmatively

approved by the SEC. 15 U.S.C. § 78s(b)(1), (3)(A). Specifically, the parties do not dispute that the mandatory arbitration rules have been discussed and reviewed by the SEC as part of its general oversight responsibilities. Assuming all of this to be true, the Court concludes that the SEC's role is insufficient to find state action. This appears to be the type of basic regulatory scheme in which the "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible . . . ." Blum v. Yaretsky, 457 U.S. at 1004.

Plaintiff also attempts to go the next step and establish that the SEC actually encouraged or coerced the exchanges to adopt the mandatory arbitration policy currently in dispute. However, the evidence does not support this position. While plaintiff's evidence does indicate that many of the proposed rule changes regarding arbitration procedures over the last two decades were generated in response to statements from the SEC, there is absolutely no evidence that the rules which require arbitration were encouraged or coerced by the SEC. The state action requirement is met "only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." Id.; see also Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982). The specific conduct about which plaintiff now complains is that she is required to submit her claims to arbitration.

In addition to the lack of evidence that the SEC encouraged or coerced the exchanges into requiring arbitration of employment disputes, it should be noted that the NYSE has required arbitration of disputes between its member firms and their employees since as early as 1958. However, the SEC did not receive the power and authority to review the employment arbitration rules of

the exchanges until 1975. See Merrill Lynch Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 135 n. 14 (1973). In other words, at the time the NYSE actually made the decision to institute mandatory arbitration, the SEC lacked the power to even review such a decision.

And finally, plaintiff argues that the involvement of the SEC in the development of the Form U-4 also indicates that state action is present. The Court is not persuaded. The Form U-4 is simply a means to facilitate simultaneous registration with more than one exchange. By itself, the Form U-4 does not require arbitration. Rather, it only requires that the individual broker-dealer abide by the arbitration procedures of the exchanges with which he or she is registering. Declaration of Michael Rubin, Exh. G at 4.

c. CONCLUSION

At the time plaintiff registered with the NYSE and thereby agreed its arbitration rules, federal law did not require her to so register. Because the NYSE's decision to require arbitration did not involve any encouragement or coercion by the SEC, the Court finds the SEC's role to be one of basic regulation and "mere approval." Blum v. Yaretsky, 457 U.S. at 1004. For these reasons, the Court concludes as a matter of law that there is no state action present in this case.[6]

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[6] Accordingly, the Court does not reach the issue of whether arbitration clause constitutes an unconstitutional condition.

B. INADEQUATE PROTECTION OF TITLE VII RIGHTS

Plaintiff's second basis for her motion for summary judgment is that the arbitration clause cannot be enforced because it does not adequately protect her Title VII rights. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991); Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244, 1247 (9th Cir. 1994). Plaintiff cites her extensive discovery regarding the detailed procedural workings of the NYSE arbitration program. For instance, one of plaintiff's complaints is that she cannot adequately vindicate his Title VII rights because The Arbitrators Manual instructs that:

> Arbitrators are not strictly bound by case precedent or statutory law. Rather, they are guided in their analysis by the underlying policies of the law and are given wide latitude in their interpretation of legal concepts.

Declaration of Michael Rubin, Exh. A-1 at 26.

In addition to disputing plaintiff's ultimate conclusion that the NYSE arbitration scheme does not allow plaintiff to effectively vindicate her Title VII rights, defendant also focuses on the actual holdings of Gilmer and Graham Oil. In Gilmer, the Supreme Court considered and rejected numerous challenges to the adequacy of the very same NYSE arbitration procedures at issue in the present case. Gilmer, 500 U.S. at 30-32.

In Graham Oil, the Ninth Circuit held that although a simple agreement to arbitrate disputes is valid, the agreement in that case is invalid because it contained the express forfeiture of specific statutory rights. Graham Oil, 43 F.3d at 1247-48. In contrast, there is no forfeiture of

specific statutory rights in the present case and therefore, the arbitration clause is valid.

After considering the entire record, including the arguments of counsel at the June 6, 1996 hearing, the Court concludes that the NYSE arbitration scheme does adequately protect plaintiff's Title VII rights.

C. KNOWING AND VOLUNTARY

Plaintiff's final argument that the arbitration clause is unenforceable is that based on extension of Prudential Insurance Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994). In Prudential, the Ninth Circuit ruled that, "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration." Id. at 1305. However, in the present motion, plaintiff does not argue that she unknowingly agreed to arbitrate, but rather that the agreement was involuntary. Plaintiff concedes that Prudential does not explicitly state that an agreement to arbitrate must be voluntary, but instead argues that it should be so extended based on the legislative history.

After having considered the entire record, including those presented by counsel at the June 6, 1996, the Court refuses to extend Prudential to require that Title VII plaintiffs may only be forced to arbitrate if they voluntarily agreed to do so.

D. PLAINTIFF'S REQUEST FOR 28 U.S.C. § 1292

At the end of the June 6, 1996 hearing, plaintiff requested that in the event that her motion is denied that the Court certify the order for interlocutory appeal under 28 U.S.C. § 1292(b). Because the Court finds that there is not a "substantial ground for difference of opinion" and an immediate appeal would not "materially advance the

ultimate termination of the litigation," plaintiff's request for 28 U.S.C. § 1292(b) is denied.

IV.CONCLUSION

For the above stated reasons, the Court hereby ORDERS that:

(1)Plaintiff's motion for summary judgment is DENIED; and

(2)Plaintiff's request for 28 U.S.C. § 1292 certification is DENIED.

IT IS SO ORDERED

DATED: AUG 26 1996.

/s/
EUGENE F. LYNCH
United States District Judge

APPENDIX C

[Stamped:
FILED
MAR 13 1997
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TONYJA DUFFIELD, Plaintiff, vs. ROBERTSON, STEPHENS & COMPANY, a partnership; and ROBERTSON, STEPHENS & COMPANY, a corporation, DOES 1-50, inclusive, Defendants.	No. C-95-109 EFL ORDER

I. INTRODUCTION

On January 11, 1995, plaintiff, a securities broker-dealer formerly employed by defendant Robertson, Stephens & Company, filed a complaint claiming Title VII and FEHA sexual discrimination and sexual harassment, breach of contract, deceit, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff primarily brings this action to challenge the

arbitration of Title VII claims in the securities industry. As a result, the primary focus of this litigation has been on plaintiff's first cause of action for declaratory relief. Plaintiff seeks a declaratory judgment which states that she and other security industry employees cannot be compelled to arbitrate their Title VII claims pursuant to the arbitration provisions in Form U-4 agreements.

On September 30, 1996, defendant Robertson, Stephens & Company filed a motion to compel arbitration and to stay litigation. Defendant contends that plaintiff knowingly agreed to arbitrate all disputes arising from her employment and that no legal constraints external to the arbitration agreement foreclose arbitration of the plaintiff's claims.

Plaintiff responds that the agreement to arbitrate was not made knowingly and that it is unenforceable as a contract of adhesion. In addition, plaintiff asks that, if the Court grants defendant's motion to compel, the Court enter judgment on plaintiff's first cause of action for declaratory judgment pursuant to Fed. R. Civ. P. 54(b).

At the February 7, 1997 hearing in this matter, the Court held that plaintiff must arbitrate all her claims because she knowingly entered into a binding arbitration agreement by signing a Form U-4 agreement. However, the Court took under submission the plaintiff's request for entry of final judgment on her first cause of action.

Subsequently, plaintiff filed a citation of new authority and a request for reconsideration.

After considering all the papers filed in connection with these motions and the oral arguments of counsel, the Court GRANTS defendant's motion to compel arbitration and DENIES plaintiff's request for reconsideration. The Court also DECLINES to enter judgment against the

plaintiff on the plaintiff's first cause of action for declaratory judgment pursuant to Rule 54(b). However, the Court has decided to CERTIFY this Order and the Court's August 26, 1996 Order for immediate appeal under 28 U.S.C. § 1292(b).

II. BACKGROUND

A. Factual Background

Plaintiff was employed by defendant as a securities broker-dealer from June 1988 to April 1994. Defendant is a member of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"). As a condition of her employment, plaintiff was required to register with a national securities exchange by signing a Uniform Application for Securities Industry Registration or Transfer, which is commonly known as a Form U-4. On June 20, 1988, plaintiff did in fact complete and sign a Form U-4 which contained the following arbitration clause:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

The NYSE requires its member organizations and their employees to arbitrate their disputes at the request of either party to the dispute. NYSE Rule 347 states:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by

> and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

After plaintiff signed the Form U-4 and began working for defendant, the parties engaged in negotiations which were intended to produce a written employment contract. In July 1988, defendant submitted a proposed contract which provided defendant with the option of requiring any employment dispute to be submitted to arbitration. Plaintiff who was represented by an attorney proposed several changes to the contract including elimination of a mandatory arbitration provision. However, the negotiations were never completed, and no employment contract was reduced to writing.

B. Procedural Background

On November 2, 1995, plaintiff moved for partial summary judgment on her declaratory relief claim. Plaintiff's motion asserted that the alleged arbitration agreement between the parties was unenforceable because it (1) imposed an unconstitutional condition of her employment, (2) did not adequately protect her rights under Title VII, and (3) was not entered into knowingly and voluntarily.

The Court issued on August 26, 1996 Order rejecting plaintiff's arguments.[1] The Court held that, as a matter of law, there is no state action involved in compelling plaintiff to file a Form U-4. Therefore, requiring employees to sign Form U-4s as a condition of employment does not constitute an unconstitutional condition of

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[1] The August 26, 1996 Order vacated and modified an earlier August 6, 1996 Order.

employment. In addition, the Court held that the NYSE arbitration scheme does adequately protect plaintiff's Title VII rights. Finally, the Court refused to extend the holding in Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994). In Lai, the Ninth Circuit held that unknowing agreements to arbitrate Title VII claims were not enforceable. Id. at 1305. This Court refused to extend Lai "to require that Title VII plaintiffs may only be forced to arbitrate if they voluntarily agreed to do so." (Order Vacating and Modifying Order of August 6, 1996 at 14.)

The Court expressly did not rule on whether the plaintiff knowingly entered into an agreement to arbitrate her claims because this issue was not before the Court.

III. DISCUSSION

A. Motion to Compel Arbitration

Since it is undisputed that plaintiff signed a Form U-4 which contained an agreement to arbitrate, plaintiff must establish that the arbitration agreement is unenforceable in order to avoid arbitration of her substantive claims. See 9 U.S.C. § 2.

Defendant contends that the Court's August 26, 1996 Order resolved all issues concerning enforceability of the arbitration agreement except whether plaintiff knowingly agreed to arbitrate employment disputes within the meaning of Lai. Defendant asserts that plaintiff did knowingly agree to arbitration within the meaning of Lai.

Plaintiff responds that plaintiff did not knowingly enter into the arbitration agreement. In addition, plaintiff's opposition raises a contract of adhesion argument as an alternative basis for challenging the enforceability of the arbitration agreement.

1. Knowing Agreement

In their respective arguments, the parties rely on different interpretations of the term "knowingly" as it is used in the Lai opinion. In Lai, the Ninth Circuit held that, "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration." Lai, 42 F.3d at 1305. Defendant contends that Lai only protects unsophisticated, uniformed, and mislead employees from compulsory arbitration of Title VII claims. However, plaintiff's argument presumes that a sophisticated and informed employee may still "unknowingly" agree to arbitration. The Court is persuaded by the defendant's interpretation and finds that the Lai decision was not intended to protect sophisticated and well-informed plaintiffs.

Defendant asserts that the Lai court's decision was based on the fact that the plaintiffs were unsophisticated individuals who were denied the opportunity to ascertain the meaning of documents that they were directed to sign. The Ninth Circuit observed,

> Plaintiffs allege that when they signed the U-4 form, they were told that they were applying to take a test which was required for their employment by Prudential, and that they were simply directed to sign in the relevant place without being given an opportunity to read the forms. Arbitration was never mentioned.

Id. at 1301. Prudential never provided the plaintiffs with a copy of the NASD Manual which contained the allegedly binding arbitration agreement. Id. The Ninth Circuit also held that, even if Prudential had provided the plaintiffs with copies of the NASD arbitration clause, "it

would not have put them on notice that they were bound to arbitrate Title VII claims" because the relevant provision "did not even refer to employment disputes." Id. at 1305.

Defendant argues that plaintiff simply cannot claim "unknowing" agreement to arbitrate because she is a sophisticated individual who was aware or should have been aware that, by signing the Form U-4, she was agreeing to arbitrate any employment dispute. Defendant maintains that, in contrast to the unsophisticated and mislead Lai plaintiffs, Duffield was a highly recruited and sophisticated industry insider who was represented by an attorney. Defendant maintains that, when plaintiff signed a Form U-4 in 1988 as a condition of her employment with defendant, she was familiar with the Form U-4 and its significance by virtue of her six years in the securities industry and having signed Form U-4s on at least two previous occasions. Further, plaintiff had ample opportunity to read the NYSE rules and should have familiarized herself with them. In addition, while the NASD provision at issue in Lai did not refer to arbitration of employment disputes, NYSE Rule 347 explicitly provides for arbitration of employment disputes. See NYSE Rule 347.

While defendant essentially argues that the facts in Lai limit the holding to unsophisticated and uninformed claimants, plaintiff assumes that a sophisticated and well-informed individual can still "unknowingly" agree to arbitrate within the meaning of Lai.

Plaintiff argues that she did not "knowingly" contract to forego her statutory remedies under Title VII for two reasons. First, plaintiff claims that she could not have knowingly agreed to arbitration because she could not have known that the Form U-4 would be interpreted to

mandate arbitration of Title VII claims. Specifically, plaintiff asserts that, at the time she signed the Form U-4 in 1988, the NYSE rules required arbitration of some disputes but not Title VII claims and courts were not interpreting the NYSE rules to require arbitration of Title VII claims. In addition, plaintiff asserts that she could not have agreed to waive her Title VII rights to a jury trial, compensatory damages, or punitive damages because those rights were not established by Congress until the 1991.[2]

Second, plaintiff argues that her agreement to arbitrate was not knowing because she believed that the defendant had agreed not to require arbitration. Plaintiff contends that, during contract negotiations, defendant's behavior caused plaintiff to reasonably believe that defendant had agreed not to require arbitration. However, the Court finds that plaintiff could not have reasonably believed that defendant had waived the arbitration agreement. While the plaintiff, through her attorney, did propose elimination of the mandatory arbitration provision from her contract, no final agreement was reached or reduced to writing.

Plaintiff cites no authority which stands for the proposition that these circumstances constitute "unknowing agreement" within the meaning of Lai. Further, plaintiff does

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[2] Plaintiff advances these arguments in a single paragraph without sufficient discussion or citations to case law. In a reply brief, defendant extensively refutes each of plaintiff's arguments.

The Court will not engage in a discussion of these individual arguments because, even if they are accepted as true, they do not provide a basis for claiming that an arbitration agreement was not knowing within the meaning of the Lai decision. See discussion infra.

not address the factual distinctions between her case and the Lai case.

The Court finds that the Lai decision was not intended to protect a sophisticated and well-informed plaintiff like Duffield. The Court declines to expand the Lai decision to protect sophisticated plaintiffs who know that they are signing arbitration agreements which could be interpreted to require arbitration of all employment disputes. The Court also declines to find that a plaintiff did not knowingly agree to arbitration when the plaintiff, represented by an attorney, has failed to protect her interests by obtaining a binding written contract.

2. Contact of Adhesion

In addition to arguing that plaintiff did not knowingly agree to arbitrate Title VII claims, plaintiff argues that an arbitration provision which is created by an employee signing a Form U-4 as a condition of employment constitutes an unconscionable and therefore unenforceable contract of adhesion.[3]

If an unconscionable arbitration provision appears in a contract of adhesion, such a provision is unenforceable just like any other unconscionable contract term. The Federal Arbitration Act provides that agreements to arbitrate are enforceable, "save upon grounds as exist at law or in equity for revocation of any contract." 9. U.S.C. § 2. Further, the United States Supreme Court holds that, "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would

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[3] This is also the position of the Equal Employment Opportunity Commission ("EEOC"). (See, EEOC's Amicus Brief at 4.)

provide grounds for the revocation of any contract." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

Plaintiff asserts that her detailed factual record in this case demonstrates that the securities industry's arbitration procedures do not adequately protect Title VII rights. Therefore, the arbitration provision at issue in this case is an unconscionable provision. Further, plaintiff asserts that since prospective employees, who have little bargaining power, often must sign Form U-4s as a condition of employment, the arbitration agreement at issue is part of a contract of adhesion. Plaintiff concludes that plaintiff's agreement to arbitrate her Title VII claims must be unenforceable because unconscionable arbitration clauses in contract of adhesion are unenforceable.

Plaintiff's argument depends upon the premise that the NYSE arbitration procedures do not adequately protect Title VII rights. The Court's August 26, 1996 Order clearly held that, "the NYSE arbitration scheme does adequately protect plaintiff's Title VII rights." (Order Vacating and Modifying Order of August 6, 1996 at 14). For the reasons stated in the August Order, the Court declines to alter its holding on this issue. Therefore, the Court concludes that the arbitration provision at issue is not unconscionable.

In addition, plaintiff cannot reasonably contend that she was forced to agree to arbitration in the face of "overwhelming economic power". Gilmer, 500 U.S. at 33. In Gilmer, the Supreme Court concluded that "[t]here is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application." Id. Like Gilmer, Duffield was a sophisticated and highly recruited individual who was represented

by an attorney. As plaintiff's own evidence and arguments demonstrate, plaintiff had substantial bargaining power and did negotiate for an employment contract that would not mandate arbitration of employment disputes. She simply failed to ensure that such a contract was reduced to writing. The Court cannot conclude on the facts of this case that the plaintiff was compelled to enter into a contract of adhesion.

B. Plaintiff's Request for Reconsideration

In response to the Court's February 7, 1997 oral ruling compelling arbitration of plaintiff's substantive claims, plaintiff filed a citation of new authority and request for reconsideration. Plaintiff seeks leave to file a motion to reconsider based on the recent D.C. Circuit case Cole v. Burns International Security Services, ___ F.3d ___, 1997 U.S. App. LEXIS 2223 (D.C. Cir. 1997).

In Cole, the plaintiff, a security guard at Union Station in Washington D.C., signed an agreement to arbitrate employment disputes according to the rules of the American Arbitration Association ("AAA"). The D.C. Circuit states that,

> We note that this case raises an issue not directly presented in Gilmer or any other Supreme Court case to date: can an employer require an employee to arbitrate all disputes and also require the employee to pay all or part of the arbitrator's fees? We hold that it cannot.

Id. at *5. On the basis of this holding, the Court compelled arbitration of the dispute, but found that the arbitration agreement had to be construed to require the employer to pay all arbitration fees in order for the agreement to be enforceable. Id.

Plaintiff contends that the substantial factual record which plaintiff has developed for purposes of this litigation demonstrates that, under the NYSE arbitration procedures, Title VII claimants are often charged large forum fees. As a result, plaintiff contends that applying the analysis of the Cole decision to the NYSE arbitration procedures necessarily leads to the conclusion that arbitration agreements based on Form U-4s are unenforceable.

Defendant responds that Cole states that the NYSE and NASD rules do not raise the same concerns as the AAA procedures. The D.C. Circuit explained that,

> This was not an issue in Gilmer (and other like cases), because, under NYSE Rules and NASD Rules, it is standard practice in the securities industry for employers to pay all of the arbitrators' fees. Employees may be required to pay a filing fee, expenses, or an administrative fee, but these expenses are routinely waived in the event of hardship.

Id. at *59.

Although Cole may provide support for plaintiff's claim that Title VII claimants should not be charged fees in order to gain access to a neutral forum, the Court finds that Cole does not provide any basis for denying the defendant's motion to compel arbitration. The Cole Court stated,

> We acknowledge the concerns that have been raised regarding arbitration's ability to vindicate employees' statutory rights. However, for all of arbitration's shortcomings, the process, if fairly conducted, is not necessarily inferior to litigation

> as a mechanism for the resolution of employment disputes.

Id. at *73. Cole does not mandate invalidating arbitration provisions because they require arbitration of Title VII claims. Even assuming arguendo that the NYSE arbitration process imposes impermissible fees on the Title VII claimants, Cole only provides persuasive authority for denying such fees. Therefore, even if Cole were binding authority in the Ninth Circuit, the Court would only invalidate any "arbitrator's fees" charged to the plaintiff rather than declare the arbitration agreement unenforceable. The Court cannot and will not expand the holding in Cole to invalidate the NYSE arbitration procedures.

Therefore, the Court DENIES plaintiff's request for reconsideration based on Cole.

C. Request for Judgment Pursuant to Rule 54(b)

Plaintiff asks that the Court enter judgment pursuant to Fed. R. Civ. P. 54(b) on plaintiff's first claim for declaratory relief and stay any arbitration proceedings until the Ninth Circuit considers plaintiff's appeal. Rule 54(b) provides that a Court may enter final judgment on one claim in an action "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b).

Plaintiff argues that an Order compelling arbitration amounts to a de facto denial of her claim for declaratory relief. Therefore, the Court should not delay plaintiff's appeal of this issue to the Ninth Circuit. However, the Ninth Circuit has held that,

> if the motion to compel arbitration in a given case is the only claim before the district court, a deci-

> sion to compel arbitration is deemed to dispose of the entire case, and permit appellate review under 9 U.S.C. § 16(a)(3) . . . On the other hand, if the motion to compel arbitration is 'embedded' in a substantive suit pending before that court, the district court's decision to compel arbitration of some or all of the claims before it is not considered to be final, and therefore not reviewable.

Lai, 42 F.3d at 1302. (citations omitted); see also, Adair Bus Sales, Inc. v. Blue Bird Corp., 25 F.3d 953, 955 (10th Cir. 1994) ("an order does not constitute a final decision, and is not immediately reviewable on appeal, if issues other than the propriety of arbitration are raised or relief other than a determination as to the arbitration of the dispute is sought"). An embedded motion to compel exists when "the underlying merits of the claims for relief are not resolved until arbitration is completed." Perera v. Siegel Trading Co., Inc., 951 F.2d 780, 784 (7th Cir. 1992).

In the instant case, the defendant's motion to compel arbitration is clearly embedded in the substantive suit because the merits of the case will not be resolved until arbitration is complete. Therefore, the Court's decision to compel arbitration cannot constitute an appealable final judgment. The decision more closely resembles an interlocutory decision setting a case for trial because it does not resolve or terminate all the proceedings before this Court. Id. at 786.

By requesting a final judgment on her first cause of action, plaintiff essentially asks the Court to transform an unappealable interlocutory decision into an appealable final judgment. However, the Seventh Circuit holds that, "a district court's entry of a Rule 54(b) judgment cannot transform an interlocutory decision into a final decision." Id. If such a transformation were allowed, the district

court could expand the jurisdiction of the circuit court. Id. Therefore, the Court will not enter judgment on plaintiff's declaratory relief claim pursuant to Rule 54(b).

D. Certification

Although the Court declines to enter judgment pursuant to Rule 54(b), the Court has decided to certify this Order and the Court's August 26, 1996 Order for immediate appeal pursuant to 28 U.S.C. § 1292(b). In the August Order, the Court found that certification was inappropriate. After considering the briefs of the parties and especially the oral arguments of plaintiff's counsel at the February hearing, the Court now finds that:

(1) These Orders involve a controlling question of law as to which there is substantial ground for difference of opinion;[4]

(2) that an immediate appeal from these Orders may materially advance the ultimate termination of the litigation.[5]

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[4] The Court recognizes that Gilmer and Lai provide clear guidance on the issues raised by the plaintiff. Nevertheless, the plaintiff's arguments, the EEOC's opposition to the NYSE arbitration proceedings, and the Cole decision persuade the Court that a substantial ground for difference of opinion exists in this case.

[5] Plaintiff has represented that the primary purpose of this litigation is to challenge the NYSE's arbitration procedures. Therefore, regardless of the result of the arbitration proceedings, plaintiff will appeal her case to the Ninth Circuit. The Court believes that it will materially advance the ultimate termination of this litigation to have a ruling from the Ninth Circuit sooner rather than later.

This Order and the August 26, 1996 Order in this matter is therefore CERTIFIED for immediate appeal pursuant to 28 U.S.C. § 1292(b).

IV. CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby ORDERS that:

(1) Defendants motion to compel arbitration is GRANTED.

(2) Plaintiff's request for reconsideration is DENIED.

(3) Plaintiff's request for entry of judgment pursuant to Rule 54(b) is DENIED.

(4) This Order and the Court's August 26, 1996 Order are CERTIFIED for appeal pursuant to 28 U.S.C. § 1292(b).

(5) Arbitration of this case is STAYED pending action by the Ninth Circuit. If the Ninth Circuit decides not to review the Court's Orders, arbitration shall proceed immediately.

IT IS SO ORDERED

DATED: MAR 13, 1997.

/s/
EUGENE F. LYNCH
United States District Judge

APPENDIX D

[Stamped:
FILED
APR 21 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONJYA DUFFIELD,	No. 97-80126
Petitioner,	DC# CV-95-109-EFL Northern California
vs.	
ROBERTSON, STEPHENS & COMPANY, a partnership, et al.,	ORDER
Respondents.	

Before: BROWNING and THOMPSON, Circuit Judges

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of the date of this order, petitioner shall perfect the appeal pursuant to Fed. R. App. P. 5(d).

APPENDIX E

Relevant Statutory Provisions

Civil Rights Act of 1991,

Section 118 of Title I of Pub. L. 102-166, *as reprinted in* 42 U.S.C. § 1981 note:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title (enacting section 1981a of this title and amending this section, sections 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 12111, and 12112 of this title, and section 626 of Title 29, Labor).

Federal Arbitration Act

9 U.S.C. § 2.
Validity, irrevocability, and enforcement of agreements to arbitrate

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds

as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3.
Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.